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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 58

OXFORD PAPER COMPANY, PETITIONER,

vs.

STEAMSHIP "NIDARHOLM," A. S. NIDAROS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1930

CERTIORARI GRANTED APRIL 28, 1930

(34,846)

(34,846)

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[fol. 4]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MAINE

No. 1122

OXFORD PAPER COMPANY, Libelant,

vs.

S. S. "NIDARHOLM"

No. 1123

A. S. NIDAROS, Cross-Libellant,

vs.

OXFORD PAPER COMPANY, Cross-Respondent

ORDER FOR CONSOLIDATION—Filed January 12, 1929

On motion of the Proctors in the above entitled causes it is by the Court Ordered that said Causes numbered 1122 and 1123 respectively be and the same are hereby consolidated and to be tried as one case in United States Court of Appeals for the First Circuit.

John A. Peters, District Judge.

Assented to: Goodwin, Proctor, Field & Hoar, Proctor for Claimant and Cross Libelant. Nathan W. Thompson, Proctor for Libelant and Cross-Respondent.

IN UNITED STATES DISTRICT COURT

No. 1122

[Title omitted]

LIBEL—Filed Auust 1, 1927

To the Honorable Judges of said Court:

The libel and complaint of the Oxford Paper Company, a corporation duly organized and existing under the laws

of the State of Maine, and having a principal place of business at Portland in said District of Maine, against the [fol. 5] Steamship Nidarholm, of which one Christophersen now is, or lately was, Master, her boilers, engines, tackle, apparel and furniture, and against all persons lawfully intervening for their interests in said Steamship, in a cause of contract, civil and maritime.

And thereupon the libelant alleges and articulately propounds as follows:

First. That the libellant at the times hereinafter mentioned was and now is engaged in the paper and pulp business with a principal place of business at said Portland.

Second. That the Steamship Nidarholm is a vessel of a burden of 2,467 tons or thereabouts used by her owners in the general cargo carrying business, both foreign and coastwise.

Third. That on or about the tenth day of May, 1927, the owners of said Steamship Nidarholm by instrument in writing chartered the whole of said Steamship to the libellant for a period of three calendar months, two weeks more or less at charterers option.

Fourth. That according to the terms of said written charter a copy of which the libellant begs leave to refer to and produce at the hearing of this cause, the owners of said ship agreed that the charterer should have the whole reach of the vessel's holds, decks and usual places for loading and that said vessel was tight, staunch, strong, seaworthy, and in every way fitted to engage in the business of carrying cargoes (both in her holds and on deck), supplied by the libellant and especially for the purpose of carrying pulp wood, the real business for which said vessel was chartered by the libellant; and it was further agreed that the charterer was to load, stow, and trim the cargo at their expense under the supervision of the Captain of said Steamship who was to sign Bills of Lading for cargo as presented, in conformity with the Mates' or Tally Clerk's receipts, for all of which services the libellant agreed to pay to the owner of said Steamship the sum of one dollar and fifty-five cents ($1.55) United States Currency per ton dead weight on Lloyds Summer Freeboard per calendar month.

[fol. 6] Fifth. That pursuant to the terms of said charter party said vessel proceeded under the directions of the libellant to Murray, C. B., Nova Scotia, at which port the libellant, under the directions and supervision of the Master of said ship, placed on board said ship a cargo of pulp wood both in the holds and on deck; such deck cargo being secured by wire lashings which were furnished by said ship; and on the sixth day of July, 1927, the loading of said cargo having been completed, the Master of said Steamship gave to the libellant a bill of lading in and by which said Master bound said Steamship Nidarholm and owners to deliver said cargo of pulp wood in like good order and condition at said port of Portland unto the libellant or its assigns.

Sixth. Thereupon the lines holding said Steamship to her loading berth were let go and said ship started on her voyage to said Portland, but immediately upon leaving the dock at said Murray it was discovered that said Steamship Nidarholm was unseaworthy in that she was cranky and wholly unfit for the voyage in which she was about to engage; but the Master of said Steamship, rather than return to said berth after discovering the unseaworthiness of said vessel, attempted to continue on said voyage and when said ship was about midway of the channel leading from said Harbor at which time the weather was fair and the sea smooth, said vessel took a sudden heavy list to starboard and then righted herself and took a list to port causing a large part of her deck cargo to be sluiced over the rail and into the waters of said channel; thereafter said ship continued to list and roll from port to starboard causing the stanchions and lashings holding said deck cargo to break and permitting aproximately 326.3 cords of said pulp wood to be thrown over the side of said vessel and into said Harbor.

Seventh. That due to the strong ebb tide running at said time it was impossible to rescue said pulp wood and said vessel thereupon returned to the dock at said Murray where it was considered unwise by her Master and libellant to reload said ship at said time, and she then proceeded to the port of Portland to deliver the balance of said cargo then on board.

[fol. 7] Eighth: The libellant further alleges that said loss, damage and non-delivery were caused wholly by the unseaworthy and cranky condition of said vessel at the commencement of said voyage, and was not caused by any stress of weather or act of God, and that said loss was without any cause or neglect of the libellant, its agents or servants.

Ninth: And the libellant further alleges that it has performed all the terms of said charter party by it to be performed and by reason of the matters hereinbefore set out it has suffered a loss, including the cost of shipping 326.3 cords of pulpwood, and other expenses incidental to the loss of said pulp wood amounting to approximately seven thousand ($7,000) dollars, all of which loss was caused by the failure to furnish the libellant a vessel that was staunch and seaworthy and fitted to carry on the work for which she was chartered.

Tenth: That said sum of seven thousand ($7,000) dollars is now due the libellant from said Steamship Niderholm, together with costs and interest to the date of payment; that said sum has been repeatedly demanded of the Master and owner of said Steamship who have heretofore neglected and refused to pay the same.

Eleventh: That said Steamship Nidarholm is now, or during the pendency of these proceedings will be in the port of Portland in said District of Maine.

Twelfth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the course of this Honorable Court in cases of admiralty may issue against said Steamship Nidarholm, her boilers, engines, tackle, apparel and furniture, and that all persons claiming any right, title or interest in said Steamship may be cited to appear and answer upon oath all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the aforesaid claim, with interest and costs, and that said Steamship Nidarholm, her boilers, engines, tackle, apparel and furni-
[fol. 8] ture may be condemned and sold to pay the same, and that the libellant may have such other and further re-

lief in the premises as in law and justice it may be entitled to receive.

Oxford Paper Company, by C. F. Young, Agent, Libellant. Woodman, Whitehouse, Skelton & Thompson, Nathan W. Thompson, Proctors.

Duly sworn to by C. F. Young. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

CLAIM OF A. S. NIDAROS—Filed August 1, 1927

[Title omitted]

Now comes A. S. Nidaros, a Norwegian Stock Company, and claims said Steamship Nidarholm, and by Robert R. Duncan, its Proctor, says that it is the owner of said Steamship Nidarholm, her boilers, engines, tackle, apparel and furniture, and as such is entitled to the possession of said Steamship, her boilers, engines, tackle, apparel and furniture.

Wherefore said A. S. Nidaros prays that said Steamship Nidarholm be delivered to it, and for such other and further relief as to justice may appertain.

A. S. Nidaros, by Robert R. Duncan, Proctor.

Duly sworn to by Robert R. Duncan. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF A. S. NIDAROS—Filed August 4, 1927

To the Honorable Judges of the District Court for the District of Maine, Southern Division:

The answer of A. S. Nidaros, a Norwegian stock company, claimant of the Steamship "Nidarholm," to the libel of Oxford Paper Company, in a cause of contract, civil and maritime, alleges:

First: The claimant admits the allegations of Article First of the libel.

Second: The claimant admits the allegations of Article Second of the libel.

Third: The claimant admits the allegations of Article Third of the libel.

Fourth: The claimant admits the allegations of Article Fourth of the libel, except that it denies that the owners of the ship agreed that said Steamship "Nidarholm" was especially fitted for the purpose of carrying pulp wood.

[fol. 10] Fifth: The claimant admits the allegations of Article Fifth of the libel, except that it denies that the deck cargo on said Steamship "Nidarholm" was secured by wire lashings which were furnished by said ship.

Sixth: The claimant denies the allegations of Article Sixth of the libel, except that it admits that said Steamship "Nidarholm" left dock at Murray, N. S., and that the stanchions supplied by the charterers, the libellant herein, broke and a part of the deck cargo went overboard.

Seventh: The claimant denies the allegations of Article Seventh of the libel.

Eighth: The claimant denies the allegations of Article Eighth of the libel.

Ninth: The claimant denies the allegations of Article Ninth of the libel.

Tenth: The claimant denies the allegations of Article Tenth of the libel.

Eleventh: The claimant admits the allegations of Article Eleventh of the libel.

Twelfth: The claimant denies the allegations of Article Twelfth of the libel, except that it admits that the allegations of the libel are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Furthering answering, the claimant alleges upon information and belief:

Thirteenth: That at the time said Steamship "Nidarholm" was placed at the disposal of the libellant under the terms of said charter party dated May 10, 1927, referred to in the libel herein, and to which the claimant also begs leave to refer and to produce at the trial, and at all times thereafter, the said Steamship "Nidarholm" was tight, staunch, strong, seaworthy and in every way fitted for the service called for by the charter party. At all times mentioned in this article of the answer, the claimant exercised due diligence to make said Steamship "Nidarholm" in all respects seaworthy and properly manned, equipped and supplied.

[fol. 11] Fourteenth: That when the claimant placed said Steamship "Nidarholm" at the disposal of the libellant under the terms of said charter party, the libellant ordered said Steamship to proceed to Murray, N. S., where she was loaded by the libellant with a cargo of pulp wood. The deck cargo was stowed and trimmed and made fast by the libellant, its agents and servants, and was held in place by poles placed upright along the bulwarks, and hereinafter referred to as "stanchions." When the vessel was loaded by the libellant she left for Portland, Maine, by order of the libellant, and very soon after leaving the dock she took a list of from five to ten degrees to port, which list she carried all the way to Portland, where the cargo was safely delivered to the charterers.

Fifteenth: That upon the discharging at Portland of the first cargo carried by the Steamship "Nidarholm" under said charter, the ship returned to Murray, N. S., by order of the libellant, and was there again loaded with pulp wood by the libellant in the manner above set forth. When the loading was completed and before the ship pulled out into the stream, she had a list of five degrees to starboard. As she straightened out in the channel and felt her helm, she righted herself and then gradually took a list of five degrees to port. This list was maintained until the bar, about three miles below the dock, was reached. As the ship came into the shallow waters over the bar, her list to port gradually increased to between five and ten degrees, and she remained there for a few minutes and until suddenly all the stanchions on the port side forward broke, and the deck cargo retained by them slid overboard. Thereupon the ship, released of the weight of the deck cargo on the port side, rolled to starboard

and all the stanchions, both forward and aft on the starboard side, broke, and the deck cargo retained by them went overboard. The ship then rolled back to port and the port stanchions aft broke and the cargo retained by them went overboard. The ship then came to an even keel and her Master returned with her to the dock at Murray, reported the loss, and asked for instructions. He was told to proceed to Portland with the cargo that remained on board the ves- [fol. 12] sel and after temporary stanchions were put up, to retain the deck cargo which remained, the ship proceeded to Portland.

Sixteenth: It is an usual and ordinary thing for a vessel with a deck cargo similar to the cargo carried in this case to take a slight list either to starboard or to port, and this was well known to the libellant, whose duty it was to so load, stow and make fast the deck cargo that it could be safely carried under conditions such as existed in this case.

Seventeenth: That the loss of said cargo and the damage consequent thereon was caused solely by the fault of the libellant, its agents and servants, in the following respects, among others:

1. The deck cargo was improperly and negligently loaded, stowed, trimmed and secured by the libellant, its agents and servants.

2. The stanchions supporting the deck cargo were of balsam spruce, a wood of insufficient strength to be put to such use, and said stanchions were weak and brittle and not fitted for the use to which they were put.

3. The said stanchions were improperly set up in that they were placed at too great an interval from each other.

4. The deck cargo was not properly secured to withstand the ordinary strains of navigation.

5. And other respects to be shown at the trial.

Eighteenth: That all and singular the premises are true.

Wherefore the libellant prays that the libel be dismissed with costs and that it may have such other and further relief as in justice it may be entitled to receive.

A. S. Nidaros, Claimant, by Robert R. Duncan, Proctor.

Duly sworn to by Robert R. Duncan. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

No. 1123

[Title omitted]

CROSS LIBEL—Filed Aug. 12, 1927

To the Honorables the Judges of the District Court of the United States for the District of Maine, Southern Division:

A. S. Nidaros, a Norwegian Stock Company, sole owner of the Steamship "Nidarholm," exhibits this its cross libel against Oxford Paper Company, a Maine corporation, in a Cause of Contract, Civil or Maritime, the libellant herein being the claimant of the Steamship "Nidarholm" in a proceeding in admiralty instituted by libel filed in this Honorable Court on August 1st, 1927, by said Oxford Paper Company against said Steamship "Nidarholm." This cross libel is filed pursuant to the provisions of Admiralty Rule No. 50 of the Supreme Court of the United States, to enforce a counter claim arising out of the same cause of action as that stated in the libel of said Oxford Paper Company above referred to, and thereupon the libellant herein alleges upon information and belief and respectfully propounds to this Honorable Court as follows:

First: That at all times hereinafter mentioned, the libellant was and now is a Norwegian Stock Company and [fol. 14] is the sole owner of the Steamship "Nidarholm," which was, previous to the accident hereinafter described, tight, staunch, strong, and in every way seaworthy and properly manned and equipped.

Second: That on or about the tenth day of May, 1927, the libellant herein chartered said Steamship "Nidarholm" to the Oxford Paper Company, the respondent herein, by a written charter party, a copy of which the libellant begs leave to refer to and to produce at the trial. Under the terms of this charter party it was the duty of the respond-

ent to load, stow and trim the cargoes to be placed on said Steamship "Nidarholm" by the respondent.

Third: Pursuant to the terms of said charter party, the Steamship "Nidarholm" proceeded to Murray, Nova Scotia, by order of the respondent, and was there loaded with a cargo of pulp wood by the respondent. A part of the cargo was placed on deck, and was secured by stanchions placed along the bulwarks by the respondent. As the "Nidarholm" left the dock she had a list of 5° to starboard. As she straightened out in the channel she righted herself and gradually took a list of 5° to port. As she passed over the shallows about three miles below the dock, this list to port gradually increased to about 10° and shortly thereafter the stanchions maintaining the deck cargo broke and a portion of the deck cargo went overboard. As the cargo went overboard, it broke, bent and otherwise damaged the Ship's bulwarks, rails, plates, steam and water pipes and hatches, and inflicted other damage to the vessel.

Fourth: Said loss of cargo and the damage to the Steamship "Nidarholm" consequent thereon were not caused by any fault or negligence on the part of the libellant herein, or by any unseaworthiness of said Steamship "Nidarholm," but were due solely to the fault and negligence of the Oxford Paper Company, its agents and servants, in the following respects, among others:

1. The deck cargo was improperly and negligently loaded, stowed, trimmed and secured by the respondent.

2. The stanchions supporting the deck cargo were of balsam spruce, a wood of insufficient strength to be put to [fol. 15] such use, and said stanchions were weak and brittle and not fitted for the use to which they were put.

3. The said stanchions were improperly set up in that they were placed at too great an interval from each other.

4. The deck cargo was not properly secured to withstand the ordinary strains of navigation.

5. And other respects to be shown at the trial.

Fifth: By reason of the premises the libellant herein has been damaged to the sum of about Fifteen hundred dollars ($1,500) consisting of the cost of repairs, detention and

other expenses, no part of which has been paid to the libellant, although demand has been made therefor.

Sixth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your libellant prays:

1. That a citation according to the course and practice of this Honorable Court in causes of admiralty jurisdiction be issued to said Oxford Paper Company admonishing it to appear and to answer all and singular the matters aforesaid.

2. That this Honorable Court shall be pleased to pronounce that the respondent herein is liable to your libellant for the amount of such damages as your libellant shall establish in the premises together with interest and costs.

3. That this Honorable Court will grant a stay of further proceedings in the aforesaid action brought by said Oxford Paper Company against said Steamship "Nidarholm" until adequate security shall have been furnished to your libellant pursuant to the provisions of the Fiftieth Admiralty Rule above referred to.

4. And for such other and further relief or both as your libellant herein may be entitled to receive.

A. S. Nidaros, Libellant, by Robert R. Duncan, Proctor.

Duly sworn to by Robert R. Duncan. Jurat omitted in printing.

[fol. 16] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Hearings were had before Judge Hale, U. S. District Judge, as follows:

First hearing had September 26, 1927.
Second hearing had January 18 1928.
Third hearing had January 26, 1928.

Depositions of Christopher Christophersen and Lief Christophersen were taken in behalf of the Steamship Nidarholm before O. D. Hooper, Notary Public, on August 4, 1927, and were introduced in evidence by the Claimant at hearing before Judge Hale, January 26, 1928.

[Title omitted]

Depositions of witnesses in behalf of the Libellant, taken at the Admiralty Room, U. S. Courthouse, Portland, Maine, before Hon. Clarence Hale, U. S. District Judge, beginning at 10:00 o'clock, a. m., on September 26th, 1927.

[fol. 17] IN UNITED STATES DISTRICT COURT

STIPULATION RE JUDGE HALE

It is stipulated by and between counsel in the above entitled matter that the fact that Judge Clarence Hale is a stockholder in the libellant company shall be waived so far as his rights to sit in and determine this case are concerned.

Mr. Duncan: I wonder if we can put that charter party in?

Mr. Thompson: I will get the original somewhere and put it in.

The Court: Well, if that is known to be a true copy of it we can put it in as the original.

Mr. Duncan: I don't imagine there is any objection.

The Court: Suppose you put it in de bene and in the meantime look it up carefully; subject to comparison later on.

(The charter party above referred to was then received in evidence, de bene, as above, and marked "Libellant's Exhibit A.")

JOHN D. MCAULAY, witness for the libellant, was duly sworn and testified as follows:

Direct examination.

Mr. Thompson:

Q. 1. What is your full name?
A. John D. McAulay.

Q. 2. Where do you live, Mr. McAulay?

A. Englishtown, N. S.

Q. 3. What is your business?

A. Stevedoring for the Oxford Paper Company in the summer months.

Q. 4. And what do you do in the winter months?

A. Work for the Gardiner Automobile Company.

Q. 5. How long have you been employed as stevedore by the Oxford Paper Company?

A. Since 1919.

Q. 6. And where?

A. At Murray.

Q. 7. Is that the only place you have loaded wood for them?

A. Yes, sir.

Q. 8. What is your title with the Oxford Paper Company? Are you boss stevedore, or what?

A. Yes, sir. Boss stevedore.

Q. 9. Now, can you tell us, Mr. McAulay, how many ships you have loaded or helped load for the Oxford Paper Com- [fol. 18] pany, with pulpwood, at Murray?

A. I couldn't tell you the exact figures; but it was about 100 to 125.

Q. 10. 100 to 125 ships?

A. Yes, sir.

Q. 11. Now, will you describe the average size of this pulpwood such as you put on the Nidarholm in this particular case?

A. Well, it run from two foot—from four inches to eighteen inches in diameter?

Q. 12. Two feet, and four to eighteen inches in diameter?

A. Yes, sir.

Q. 13. And is that the same as you have been loading during your time with the company?

A. Yes.

Q. 14. Describe how you did load these ships at Murray? Well, first, was the Nidarholm loaded in the same manner as the other ships have been loaded?

A. Yes, sir. In the same maner. The wood comes out of the conveyor on an endless rope, drops down the—well, down through chutes, into the hold of the steamer. After the hold is filled the decks are filled just the same as any

other ships. There is no difference in the way the wood comes on.

Q. 15. Will you tell us briefly and quickly how the deck cargo is supported?

A. It is supported by lashings from the hatch coamings.

Q. 16. Well, first, do you erect stanchions.

A. Stanchions are put up. Yes, sir. It isn't my work to erect stanchions. I have nothing to do with that.

Q. 17. I understand that. But just so the Court will have the thing in mind, tell us just how these stanchions are placed?

Mr. Duncan: Well, if he had nothing to do with that, I object to it.

Mr. Thompson: Well, I thought he possibly observed it. Never mind. Strike it out.

Q. 18. Then, as I understand you, first you load the holds of the ship full, and then you continue on with the deck-load?

A. Yes, sir.

Q. 19. Now did you load the Nidarholm exactly in the same manner as you have described?

A. Yes, sir.

[fol. 19] Q. 20. Whether or not her holds were full before you started on the deck cargo?

A. Yes, they were filled.

Q. 21. Do you remember whether or not you were on duty loading that ship the night before she sailed?

A. Yes, sir.

Q. 22. What time did you come on duty that night, Mr. McAulay?

A. Seven p. m.

Q. 23. And she sailed what time the next day, if you remember?

A. I can't say. It was— Well, I wasn't around when she sailed. I can't say.

Q. 24. What was the condition of the deck cargo of the Nidarholm at the time you came on duty at seven o'clock the night before she sailed?

A. She had about half a deck-load.

Q. 25. Do you know about how high that half a deck-load would be above her deck? Approximately?

A. Oh, about seven and eight feet. More or less.

Q. 26. Did you talk with the captain of the ship that night?

A. Yes, sir.

Q. 27. Where did you first talk with him, and about what time?

A. I can't say the first time. He was around the deck until twelve o'clock that night.

Q. 28. And did you talk with him between the time you came on, at seven o'clock, and when he left the deck at twelve?

A. I was speaking to him when he left the deck at twelve.

Q. 29. Was anything said to him relating to the cargo at that time?

A. Well, only that she had a list.

Q. 30. This is before twelve o'clock?

A. Yes, sir.

Q. 31. Now, tell us what you told the captain at that time, if anything?

A. I asked him if he wanted to be called any time when the boat was through loading.

Q. 32. He— What did he tell you?

A. Well, he said he wanted to be called at four o'clock.

Q. 33. And then did he go below?

A. So far as I know. I didn't see him until I called him.

Q. 34. What time did you call him?

A. Three-fifty.

Q. 35. Personally?

A. I sent a watchman after him.

[fol. 20] Q. 36. Now, tell me how you happened to call him at three-fifty? You said he told you to call him at four?

A. Well, in my opinion the ship had enough wood on at that time.

Q. 37. What made you think she had enough wood on at that time?

A. She was drawing quite a draught.

Q. 38. Was she on an even keel?

A. No, sir.

Q. 39. Well, tell us about that?

A. She had a starboard list.

Q. 40. Which way did she start to list?

The Court: He said "starboard list."

Q. 41. Oh, pardon me: Which side of the vessel was to the dock?

A. Starboard side.

Q. 42. And she was listing toward the dock?

A. Yes, sir.

Q. 43. And did the Captain come out in response to your call at three-fifty?

A. Yes, sir.

Q. 44. And was he fully dressed then?

A. No.

Q. 45. What did he have on?

A. All that I could see was his kimono and slippers.

Q. 46. Where did you first talk with him, when he first came out at three-fifty? What part of the ship?

A. On the bridge.

Q. 49. Tell the Court what conversation took place between you and the master when he came on deck in response to your call in the morning?

A. I couldn't say what he said to me. He said it very snappy. I told him not to speak quite so fast until he saw the after deck.

Q. 50. Did you then go on the after deck?

A. Yes. We went out on the boat-deck aft.

Q. 51. You and the captain together?

A. Yes, sir. I asked him what did he think of her now. He said he didn't know what was wrong. "Well," I said, "That is what I would like to find out. What is wrong?"

Q. 52. Did he give you any instructions?

A. He wanted the wood stopped.

Q. 53. Did you stop it?

A. Yes. I send a man ashore to stop the wood.

[fol. 21] Q. 54. And how soon, after the instructions were given to stop, was the wood stopped?

A. Well, it takes about three minutes.

Q. 55. In about three minutes the wood was stopped, and what else did the Captain say to you and what instructions did he give you?

A. He wanted to trim the wood over to the port side to take the list out of her.

Q. 56. And did you do it?

A. Yes. I gave orders to the stevedores under me to have the men trim the wood over to the port side until she was upright.

Q. 57. Did the captain stay right there?

A. Yes. He wanted to go to dress, but I told him to stay right where he was at.

Q. 58. How long did it take you to trim the wood over to the port side before the vessel righted up?

A. About twenty to twenty-five minutes.

Q. 59. And did the ship righten up on even keel?

A. Yes, sir.

Q. 60. Then what did the Captain tell you?

A. I asked him if he was satisfied with all he had on; and he said no, he wanted five cords on the forward deck and ten on the after deck.

Q. 61. Did you say anything to him?

A. I said he could have what wood he wanted, so far as I was concerned; but I thought he had enough wood on.

Q. 62. Did you then put on some more wood?

A. Yes, sir.

Q. 63. Where did you put it on first?

A. On the forward deck.

Q. 64. And was the captain there watching it?

A. Yes, sir. Standing right by me.

Q. 65. What happened? Did you put the five cords on forward?

A. No, sir. I don't think we did. I wanted to get some aft.

Q. 66. Why didn't you put the five cords on forward right off?

A. Well, there were so many working forward and so many working aft, at each time. Two gangs. One forward and one aft.

Q. 67. Well, what happened when that wood was put on?

A. She started to list to starboard.

[fol. 22] Q. 68. How soon after you started to put the wood on?

A. Maybe five or six cords on before she started to list.

Q. 69. Back to starboard again?

A. Yes, sir. Back to starboard.

Q. 70. Did you make any talk with the master then?

A. I asked him if he was going to take the full amount, and he said yes.

Q. 71. Did you put on the full amount?

A. I put on what he wanted.

Q. 72. And where was that additional fifteen cords trimmed?

A. On the after deck——

Q. 72. Well, I meant starboard or port?

A. Starboard side. No. Port side. Port side.

Q. 73. Will you tell the Court, after this ten to fifteen cords were put on, how the deck cargo was? Was there more on the port side or more on the starboard side?

A. Considerably more on the port side than on the starboard.

Q. 74. And did the ship still have a starboard list?

A. Yes, sir. Quite a starboard list.

Q. 75. Would you attempt to say how many degrees she had?

A. I couldn't say.

Q. 76. Did the captain give you any further orders or instructions?

A. Nothing.

Q. 77. When did the captain turn in, if at all, again?

A. Not while I was there. I was speaking to him when I left.

Q. 78. Did you make any talk at that time with the captain about the tanks on that ship?

A. Yes, sir.

Q. 79. When was that?

A. That was after I called him.

Q. 80. At three-fifty?

A. Yes, sir. Or later on.

Q. 81. Tell us what talk you had about the tanks?

A. I asked him if his tanks were right, and he said they were; perfectly all right. I asked him about his coal bunker. He said he had, if anything at all, more coal on the port side than he had on the starboard. I told him there was something wrong somewhere.

Q. 82. Did the captain do anything else, to your knowledge?

A. Well, I couldn't understand what he said. He spoke in Norwegian.

[fol. 23] Q. 83. Who did he speak to?

A. To the watchman.

Q. 84. As a result of that did you see anything happen?

A. I see the chief engineer come on deck.

Q. 85. What time did the chief engineer come on deck?

A. Somewhere round—well, somewhere between four and five. I couldn't say exactly when.

Q. 86. Did you overhear any conversation between the captain and the chief engineer?

A. They were speaking to one another, but I couldn't tell what was said by them.

Q. 87. Did you see anything done about the ship?

A. Yes, sir.

Q. 88. What?

A. I see the pumps working.

Q. 89. On which side?

A. I couldn't say which side. The water was coming out on the port side.

Q. 90. A big stream or small stream?

A. Quite a stream.

Q. 91. How soon was this after you saw the captain and chief engineer talking?

A. Not very long.

Q. 92. Were any soundings made of the ship that you know?

A. Yes.

Q. 93. How did you know?

A. I seen the watchman sounding the tanks.

The Court: What do you mean by "not very long"? A few minutes? Say, five minutes?

A. Well, within five minutes after the chief came on deck the tanks were sounded.

Q. 94. Well, the Court is talking about the stream of water. How long was that after?

A. Maybe five minutes after the tanks were sounded.

Q. 95. Then you saw him sound the tanks and then you saw the stream of water running? Is that it?

A. Yes, sir.

Q. 96. You have already testified, Mr. McAulay, that you have helped load somewhere between 100 and 125 vessels at this same place. In your experience do you often see ships act as this one did at that time?

A. One other.

Q. 97. With the exception of that one, have you ever seen ships act as this one did?

A. Not exactly.

[fol. 24] Q. 98. Well, did you—Tell us; how did she act any different?

Mr. Duncan: I object.

The Court: How did she act? Tell us, in your own words?

A. After we trimmed the wood over and she came upright the ship stayed straight. I didn't meddle with them any more.

Q. 99. What I mean is, how did she act during the loading? At three-fifty, and so on?

A. The Nidarholm, do you mean?

Q. 100. Yes?

A. Well, she listed to starboard.

Q. 101. Would you attempt to say how much more wood there was on the port side than there was on the starboard side, when you left the ship?

A. I could not say. But there was considerably more on the port side.

The Court: While she was still listing to starboard.

A. Yes, sir.

Q. 102. How did the list, when you first called the captain at four o'clock, compare with the list of the ship after you had put on this ten to fifteen cords additional at the captain's request?

A. She had more of a list after the fifteen cords were put on.

Q. 103. How much more?

A. Quite considerable more.

Q. 104. Quite considerably more?

A. Yes.

The Court: And they were put on the port side?

A. Yes, Your Honor.

Q. 105. How did the deckload on this ship, as to height and quantity, compare with deckloads you have put on other ships in your experience?

A. They were about the same. Only she was higher on the port side. The deck cargo was higher on the port side. That is about the only difference that I could see.

Q. 106. Otherwise about the same?

A. Yes, sir.

The Court: Now I have got to go over to the bank on an important matter for perhaps half an hour. Is that all right to proceed, Mr. Thompson, so far as you are concerned? Would you rather I would be here, Mr. Duncan, when you cross-examined this witness?

Mr. Duncan: I would rather, Your Honor. I think perhaps it would be well to suspend until Your Honor gets back.

(Recess until 11:30 o'clock a. m.)

[fol. 25] (McAulay still on stand. Direct Examination by Mr. Thompson continued.)

Q. 107. Mr. McAulay, I am not sure that I understood you. That additional fifteen cords that was put on after the captain came out there; where was that placed? Forward or aft or both?

A. Both.

Q. 108. Well, how was it proportioned? How much of it was forward and how much was put aft?

A. Four cords put on the forward deck first of all. As near as I could judge.

Q. 109. Yes. And how much put aft?

A. He wanted the other ten cords run on the after deck.

Q. 110. And did you put that there for him?

A. Yes, sir.

Q. 111. And did you subsequently put the fifth cord on for him or not? On forward?

A. Yes. I put the fifth cord on the forward deck afterwards.

Q. 112. You have already testified, if I understood you, that just before you put on this fifteen cords the ship was on about an even keel?

A. No, sir.

Q. 113. Just before?

A. Yes. Yes.

Q. 114. And after you put the fifteen cords on—five forward and ten aft—what did she do then?

A. She gradually listed to starboard, as the wood was coming on.

Q. 115. Now, after she started to list to starboard during the time these fifteen cords was put on, did she list more or less than she had previously listed to starboard?

A. More. More to starboard.

Q. 116. What time did you leave the vessel?

A. Six o'clock in the morning.

Q. 117. And was she on an even keel when you left her?

A. No, sir. She had a heavy starboard list.

Q. 118. What did you do with the fifteen cords that you dropped on her? Where did you trim it to?

A. We trimmed it gradually to the port side.

Q. 119. Did that help take out some of the list?

A. No, sir. She still had a starboard list.

[fol. 26] Q. 120. Did it take out some of it?

A. No, sir.

Q. 121. Did it help righten her up any?

A. No, sir.

Cross-examination.

Mr. Duncan:

X Q. 1. Have you ever been to sea, Mr. McAulay? Are you a seaman at all? Have you ever been to sea?

A. Yes, sir.

X Q. 2. In what capacity?

A. On a revenue boat.

X Q. 3. How long were you at sea?

A. One season.

X Q. 4. What were your duties? What job did you have?

A. Wheelsman.

X Q. 5. Is that the only experience you have ever had on a ship?

A. No. I have been born right at the water-front. I have been off and on in small schooners.

X Q. 6. Going on small schooners?

A. Yes, sir.

X Q. 7. Going where?

A. Fishing, once in a while.

X Q. 8. Do you mean just for pleasure?

A. No, sir. Fishing trips.

X Q. 9. Have you ever been on a cargo ship?

A. No, sir.

X Q. 10. You said it wasn't your job to look after putting up the stanchions that retained the deck cargo. Is that true? I will put it this way: Whose job is it up there—on behalf of the Oxford Paper Company—to attend to the placing of those stanchions?

A. Mr. McKnight and the carpenter.

X Q. 11. What is his name?

A. McKnight.

X Q. 12. Who is he—Is he here?

A. Yes, sir.

X Q. 13. What is McKnight's job?

A. He is a millwright. And he is the superintendent of the whole works there.

X Q. 14. Is he the general superintendent for the Oxford Paper Company at Murray?

A. Oh, no.

X Q. 15. What do you mean by saying that his job is to superintend the whole works there, then? What is his job? You must know what his job is. What is it?

A. He looks after the shipping of the wood.

[fol. 27] X Q. 16. Is he in charge of the shipping of the wood?

A. I can't say.

X Q. 17. You don't know?

A. I don't know.

X Q. 18. You were the boss stevedore?

A. Yes, sir.

X Q. 19. Well, what are your duties?

A. My duties is to see that the ship is loaded.

X Q. 20. Your duties are to see that the ship is loaded?

A. Yes, sir.

X Q. 21. And do you have charge of the way she is loaded?

A. No, sir.

X Q. 22. Who does have?

A. The captain.

X Q. 23. The captain has charge of the way she is loaded, but it is your duty to see that she is loaded?

A. Yes, sir.

X Q. 24. When a ship comes into port you don't have anything to do with putting up these stanchions at all?

A. No, sir.

X Q. 25. Mr. McKnight does all that. Is that true?

A. He looks after the men who puts the stanchions up; and gives them orders.

X Q. 26. Your duties don't begin until you are ready to put the cargo on board the vessel. Is that true? You must know that, Mr. McAulay?

The Court: Why can't you answer yes or no?

Mr. Thompson: He don't give him a chance to answer.

Mr. Duncan: I am trying to find out what his job is up there.

The Court: Let him answer.

A. My job is to look after the stevedores. I am head stevedore, over the boats; the stowing.

X Q. 27. Then your duties don't begin until you are ready to put the cargo on ship?

A. No, sir.

X Q. 28. And they continue until the ship is loaded?

A. Yes, sir.

X Q. 29. You said you had one other ship up there that you experienced some difficulty with?

A. Yes, sir.

X Q. 30. What was the name of that ship?

A. S. S. Tuckerhoe.

X Q. 31. Did she have the list when she left port?

A. Yes, sir.

[fol. 28] X Q. 32. Did you ever have the steam-ship Gustav Biegland up there loading cargo?

A. I couldn't say.

X Q. 33. You don't know?

A. I don't know.

X Q. 34. Did you ever have a ship named the Certo?

A. Yes, sir.

X Q. 35. Did you ever have any trouble with her?

A. I didn't.

X Q. 36. Did she have any trouble with the cargo that she loaded at Murray, so far as you know? Did she lose any of it on the way to Portland?

A. Yes, sir.

X Q. 37. Where did she lose it?

A. I don't know.

X Q. 38. Did the stanchions break in that case?

A. I don't know.

X Q. 39. You do know she lost her deck cargo on the way to Portland. If you don't know, say so?

A. I don't know where she lost it; or whether she lost it. I heard so.

X Q. 40. You were about your duties at Murray when this ship Nidarholm took her first cargo, were you not?

A. Yes, sir.

X Q. 41. The trip upon which this loss was sustained was her second trip?

A. Yes, sir.

X Q. 42. Were you on deck when the loading was completed on the first trip?

A. Yes, sir.

X Q. 43. Did the vessel have a list?

A. No, sir.

X Q. 44. Had no list at all?

A. No, sir.

X Q. 45. Did you see her pull away from the dock the first time?

A. No, sir.

X Q. 46. You don't know whether she had a list when she got out into the stream or not, then?

A. No. I don't.

X Q. 47. Did you load the Nidarholm on the third trip; the one after the loss was sustained?

A. Yes, sir.

X Q. 48. Did she have a list when the loading was completed?

A. No, sir.

X Q. 49. Do you know whether or not she had a list when she was out in the stream after the third trip?

A. I don't know.

[fol. 29] X Q. 50. The captain told you to call him about four a. m.,

A. Yes, sir.

X Q. 51. And you did call him about four a. m.?

A. Three-fifty.

X Q. 52. Yes. Three-fifty. And when the captain came up on deck the vessel had a starboard list. Is that right?

A. Yes, sir.

X Q. 53. How much of a starboard list?

A. I don't know.

X Q. 54. Where was the cargo piled when the captain came up on deck, with respect to port and starboard sides? Was it levelled off?

A. No, sir.

X Q. 55. Well, how was it piled? More on the starboard or more on the port; or what?

A. More on the port.

X Q. 56. There was more on the port side, when the captain came on deck?

A. Yes, sir.

X Q. 57. But the vessel had a list to starboard?

A. Yes, sir.

X Q. 58. You understand that the captain has already testified in this case?

A. Yes, sir.

X Q. 59. The captain has testified as follows:—on page 41—Now I want you to listen to this: "When I come up—I had told them to call me about that time—and when I come up they were dumping the logs from the chutes on to the deck. Now the chutes are so short that when the deck cargo is nearly finished there is only a little drop from the end of the chutes down to the cargo. So that all the cargo that drops off the chutes drops on the inside of the ship; and in this case, where she was with the starboard side to the dock, it drops to the starboard side. And that is the condition I found when I came up; that there were big heaps of cargo on the starboard side, much more cargo on the starboard side than on the port side, giving the ship a list inwards." Now, in view of that testimony, do you want to continue—do you still insist that when the captain came on deck there was more cargo on the port side?

A. We had it trimmed from——

X Q. 60. No. I am not asking you about trimming. When the captain came on deck you stated there was more [fol. 30] cargo on the port side than there was on the starboard side?

A. Yes, sir. That is true.

X Q. 61. And you are not influenced by what the captain has testified to?

A. No, sir.

X Q. 62. What did the captain tell you to do?

A. To stop the wood.

X Q. 63. And what else did he tell you to do?

A. He told me to trim some wood over on the port side, to see if it wouldn't straighten her up. Trim her over to the port side to straighten her up.

X Q. 64. Although there was more wood on the port side when he said that?

A. Yes, sir.

X Q. 65. And did you trim more wood to the port?

A. Yes, sir.

X Q. 66. And you say the effect of putting more weight on the starboard—I mean on the port side—of the vessel was to make her take a greater list to starboard?

A. No, sir.

The Court: He didn't say that had the effect. He said that although they put it on the port side she still continued——

X Q. 67. Well, I don't want to get mixed up. There was more cargo on the port side than on the starboard?

A. Yes, sir.

X Q. 68. But the vessel had a list to starboard?

A. Yes, sir.

X Q. 69. Under the Captain's directions you trimmed still more cargo to the port side?

A. Yes, sir.

X Q. 70. And after that was done the vessel had a greater list to starboard than she did before?

A. No.

Mr. Thompson: Oh, no. He didn't say that.

The Court: No. She still continued to have a list to starboard.

X Q. 71. Well, I will ask the question now. It is my impression that he said she had more list. After you shifted some of the cargo over to the port side how did the—did the ship have the same list that she had before, or more, or less?

A. She came on to an even keel. I said that before.

X Q. 72. After you made the shift to port?

A. Yes, sir.

[fol. 31] X Q. 73. Now, did she have a list to port at any time while she was lying at the dock?

A. Not while I was on her. Not while I was on her.

X Q. 74. You spoke about seeing some water coming out of the ship on the port side. Whereabouts on the ship? Forward or aft, or where was it?

A. Amidships.

X Q. 75. Amidships?

A. Yes, sir.

X Q. 76. And you didn't know—do you know whether or not the pumps were working?

A. Yes, sir.

X Q. 77. Did you see them working?

A. I heard them working.

X Q. 78. You heard them working?

A. Yes, sir.

X Q. 79. How long did that water continue to run out of the side of the ship?

A. While I was on her. From four to six.

X Q. 80. From four to six?

A. Yes. Shortly after four.

X Q. 81. You don't know where the water was coming from, do you?

A. No, sir.

X Q. 82. Do you know whether it was fresh or salt water?

A. I do not. No, sir.

X Q. 83. Were you around the next morning when the ship left the dock?

A. No, sir.

X Q. 84. Did you see the stanchions in this case put up?

A. I seen them up.

X Q. 85. Did you see them put up?

A. Yes.

X Q. 86. Where were you when the stanchions were put up?

A. On the ship.

X Q. 87. What were you doing on the ship at that time?

A. Stevedoring.

X Q. 88. You had no responsibility for putting the stanchions up?

A. No, sir.

X Q. 89. You just saw them go up?

A. Yes, sir.

X Q. 90. Now, what did you use for lashings? In the ordinary run of cases up there? For lashing the stanchions?

A. I have nothing to do with lashing.

X Q. 91. Did you see the stanchions that were put up on [fol. 32] the third trip the Nidarholm made? The one after this accident occurred?

A. Yes, sir.

X Q. 92. Were they the same kind of stanchions?

Mr. Thompson: Is that admissible? What was done after the accident? There is no jury here to prejudice, of course.

Mr. Duncan: The reason I asked that question I was showing that the stanchions which were used on the third trip were a great deal larger and heavier than the ones that were put up by these people on the trip in which the accident occurred.

The Court: Do you mean that after the accident they had heavier stanchions?

Mr. Duncan: Yes, Your Honor. You see, one of our claims is that the stanchions were insufficient.

The Court: And that heavier stanchions were actually furnished afterwards by the Oxford Paper Company?

Mr. Duncan: Yes, sir.

ask the question, subject to objection.

The Court: I have some doubt, but I will allow you to

(Exception allowed and noted.)

X Q. 93. Is there any difference between the stanchions put up on this third trip and the ones that were put up when the loss occurred?

A. I don't know.

X Q. 94. During this period while the pumps were working did you notice any change in the ship?

A. No, sir.

X Q. 95. You said, in your direct examination, that when you called the captain you talked to the captain and wanted

to get some cargo aft. Why did you want to get some cargo aft?

A. I didn't want to get it aft.

Mr. Thompson: I didn't so understand it.

X Q. 96. Well, I will ask you the question. When you spoke to the captain did you say anything to him about where you wanted the cargo to go?

A. No, sir.

X Q. 97. When the captain spoke to the man that you referred to, they spoke in Norwegian?

A. Yes, sir.

X Q. 98. You don't know what was said?

A. No, sir.

[fol. 33] X Q. 99. How long did the captain stay on deck after that conversation?

A. While I was on deck.

X Q. 100. Until six o'clock?

A. Yes, sir.

X Q. 101. Did he go down and change his clothes?

A. No, sir.

X Q. 102. You went ashore at six o'clock and left the dock?

A. Yes.

X Q. 103. What was the condition of the vessel? The loading had been completed, hadn't it?

A. Yes, sir.

X Q. 104. Was the water still running out of the port side?

A. While I was on her.

X Q. 105. Was it still running out when you left her?

A. Yes, sir.

X Q. 106. Still running?

A. Yes, sir.

X Q. 107. How big a stream was coming out?

A. I don't know.

X Q. 108. Well, you saw it, didn't you?

A. Yes, sir.

X Q. 109. Was it coming out on the side away from the dock?

A. Yes, sir.

X Q. 110. Any lights over there?

A. No, sir.

X Q. 111. How could you see the water coming out?

A. Daylight.

X Q. 112. At four o'clock?

A. Sure. It was daylight then.

The Court: What month was this?

Mr. Thompson: July.

X Q. 113. Well, now, when you left the dock what was the position of the ship? Did she have a list when you left, one way or the other?

A. She had. A starboard list.

X Q. 114. How much?

A. I couldn't say.

X Q. 115. Was it as much as she had when you called the captain at four o'clock in the morning?

A. More.

X Q. 116. More list than she had then?

A. Yes, sir.

X Q. 117. Did you have any talk with the captain just before you left?

A. Yes, sir.

X Q. 118. What was that talk?

A. I wished him good luck on his trip.

X Q. 119. What did he say?

A. He said "All right."

[fol. 34] X Q. 120. You didn't have any talk about the condition of the ship?

A. No, sir.

X Q. 121. You weren't worried about her?

A. No, sir.

X Q. 122. He didn't seem to be worried?

A. He didn't seem to be. No, sir.

(Witness excused.)

George A. McKnight, witness called by the libellant, was duly sworn and testified as follows:

Direct examination.

Mr. Thompson:

Q. 1. Your full name is what?

A. George A. McKnight.

Q. 2. You reside at Frederickton, New Brunswick?

A. Yes.

Q. 3. Business?

A. Sir?

Q. 4. What is your business?

A. Civil engineer.

Q. 5. In the employ of anybody particularly?

A. Of the Oxford Paper Company.

Q. 6. And for how long have you been in the employ of that company, Mr. McKnight?

A. With the Oxford and Nashwaak, seven years.

Q. 7. And where are you particularly employed by the Oxford Paper Company?

A. At Murray this last three years.

Q. 8. Where the Nidarholm was loaded on this trip in question?

A. Yes, sir.

Q. 9. What are your duties with reference to the loading of ships at Murray?

A. I look after the operating of the mill and the loading and fitting of the vessels, and act as assistant and general superintendent and mill manager; that is the term they use.

Q. 10. And have you had that position for some years?

A. Two years.

Q. 11. And do you have anything to do with preparing ships for receiving pulpwood?

A. Yes, sir. I supervise.

Q. 12. Describe how a ship—such as the Nidarholm in this case—is prepared for receiving a deck cargo of pulpwood?

Mr. Duncan: Could we limit that to the Nidarholm. You said any ship like the Nidarholm.

[fol. 35] Q. 13. How was the Nidarholm prepared for receiving a deckload of cargo, on the trip in question?

A. It was supplied with stanchions.

Q. 14. Go ahead. The Court doesn't understand it, and none of us do. Tell us all about it.

A. The stanchions are made up of poles from 20 to 22 feet in diameter—I mean in length—and from five to six inches at the top end.

Q. 15. And what would they be at the butt?

A. Various sizes. According to the growth of the tree. Some would be as large as ten inches at the but, and some would be eight to nine. Varying.

Q. 16. Are those placed all the way around the ship?

A. Yes. All the way where the deck is open.

Q. 17. Everywhere where cargo goes?

A. Yes, sir. They are secured by lashings to the rail and at the bottom by lashings to the rail bracings.

Q. 18. During the time you have been at work in this same capacity how many ships have you helped prepare for loading?

A. I couldn't say just the number. About ten.

Q. 19. Ten ships?

A. Yes, sir.

Q. 20. And have you seen other ships prepared, too?

A. Yes, sir.

Q. 21. How does the way the Nidarholm was prepared for receiving deck cargo in this case compare with the other ships that you have helped to load or seen prepared for loading? I mean other ships that you have helped prepare for loading, and other ships you have seen prepared for loading?

A. It was the same.

Q. 22. Tell us how those poles or stanchions are lashed? First, how far apart are they—or were they, on the Nidarholm?

A. Between four and five feet. I don't think much over four feet.

Q. 23. And is each particular stanchion lashed?

A. Yes.

Q. 24. With a wire?

A. No. With a hemp rope. About a twelve-thread rope.

Q. 25. I am talking about the Nidarholm.

A. Twelve-thread rope, lashed at the rail and around the brace at the bottom.

[fol. 36] Q. 26. And was there any timber or timbers running horizontally fore and aft? Longitudinally?

A. Yes. One inch boards about three inches apart on the inside of the stanchions

Q. 27. Are those boards nailed to the stanchions?

A. Nailed to each stanchion. Two nails at each board to each stanchion. And later three by six or eight—sometimes six; it is never less than three by six—and sometimes is as high as three by nine—inch planks are placed on the outside and spiked to the stanchion about ten to twelve feet above the deck. They are spiked on the outside of the stanchion horizontal with the deck of the vessel. They are spiked two thicknesses making six inches thick and from six to nine inches wide. These are to receive the lashings from the hatch coamings to support the stanchions.

Q. 28. Will you describe where these lashings run from? A. They run from the hatch coamings. There is usually rings or buckles in the hatch coamings, and the wires are attached to those and taken around this timber that is placed——

Q. 29. That is, this three by six or nine?

A. Yes, sir.

Q. 30. And how many stanchions do one of those timbers cover?

A. Generally three. Sometimes it depends on the length of the plank. Sometimes it will reach four, but generally three.

Q. 31. Does this lashing run to each separate stanchion or to the center of the three?

A. To the center of the three, so that the timber on the outside will support three stanchions.

Q. 32. Are you familiar with the stanchions put on the Nidarholm in this case?

A. Yes, sir.

Q. 33. Tell the Court how they compared with the other stanchions that you have put on other vessels of similar size and type?

A. They were the same. Equally as good. Out of the same pile.

Mr. Duncan: This testimony that has gone in has been of the Nidarholm stanchions?

Mr. Thompson: As I understand it. Yes.

Q. 34. By whom were the lashings in the particular case furnished?

A. By the ship.

[fol. 37] Q. 35. And what did they consist of?

A. They consisted of wire lines.

Q. 36. Wire rope?

A. Yes. Wire rope.

Q. 37. By whom were these stanchions put in place on this Nidarholm?

A. By the ship's crew.

Q. 38. Did they put the stanchions up?

A. Oh, no. The stanchions were put in place by our carpenter.

Q. 39. And these timbers put on by your carpenter?

A. Yes.

Q. 40. By whom were the lashings put on?

A. The ship's crew.

Q. 41. You are sure of that?

A. Yes, sir.

Q. 42. And they were ufrnished by the ship?

A. Yes, sir.

Q. 43. The Nidarholm had made one voyage on this charter in question prior to the one where the loss occurred?

A. Yes, sir.

Q. 44. Were the same stanchions used in that case that were used on the one when the loss occurred?

A. Yes, sir.

Q. 45. Did you have any talk with the master or mate of the ship as to any lashings in addition to what they did use on the first and second trips?

A. Yes, sir.

Q. 46. When was that? With reference to the first trip?

A. That is when we were about complete with the deck load on the first trip.

Q. 27. What was that conversation?

A. I asked the captain if he was going to put a lashing from the mast to the center of the hatch; that is to the space between the two hatches. There was a long space that gets no lashing from the hatches.

Q. 28. How long is that space, on the Nidarholm?

A. Approximately twenty feet.

Q. 29. Go ahead?

A. I asked him if he would put that lashing on and he said no, it wasn't necessary. I spoke to the mate also about it, but they refused to put it on.

Mr. Duncan: Now, may I have that again? Who refused?

A. The first mate and the captain.

The Court: Did you request it to be put on?

A. I did.

Q. 50. Did you make that same request of—on the second [fol. 38] trip? Or speak of it again?

A. I wouldn't swear that I did the second trip, but I did the first.

Q. 51. Have you made a diagram for me to show that, in a general way?

A. I have made a rough sketch. Yes.

(Sketch marked "Libellant's 2".)

Mr. Thompson: I would like to offer that purely as a chalk and offered as such.

Mr. Duncan: I think it gives a wrong idea as to some of the details in here. However, I don't object to it, as a chalk.

The Court: Very well. Admitted as a chalk.

Q. 52. Step over here and explain first the drawing on the left hand side of "Libellant's 2". What does that show?

A. It shows an approximate view of the ship's deck, showing the decks that were loaded with wood.

Q. 53. And number one hatch is marked "No. 1"?

A. Yes, sir.

Q. 54. Where would the mast of Nidarholm be??

A. About midway between those two hatches.

Q. 55. Where would the lashing that you referred to go?

A. Those lashings would go around the mast and across out on top of the cargo.

Q. 56. And would they go to one stanchion or more?

A. Sometimes one and sometimes two. If we can get two——

Q. 57. And would those stanchions opposite that mast have that same fore and aft timber that you have already testified about?

A. No.

Q. 58. This lashing that you testified about goes right across the top of the cargo?

A. Yes, sir. The entire width of the deck.

Q. 59. That would be both forward and aft of the mast?

A. Yes, sir.

Q. 60. Whether or not that would have materially strengthened the fastening of the deck cargo in your opinion?

A. In my opinion it would be a great support. Yes, sir.

Q. 61. On the right hand side of Libellant's 2 is another [fol. 39] diagram with the black dotted lines?

A. That is the deck with the hatch coaming and lashing.

Q. 62. That is the lashing running from the ring-blot in the deck to about the center of the stanchion?

A. Yes, sir. About ten to twelve feet.

Q. 63. Did you see the Nidarholm loaded in this particular case?

A. Yes, sir. I was aboard of her off and on most of the time.

Q. 64. When did you first come aboard that ship yourself before she sailed on the voyage when the loss occurred?

A. Close to seven o'clock in the morning.

Q. 65. What time did she sail?

A. About half past twelve. Shortly after twelve.

Q. 66. Was she all through loading when you came on board about seven o'clock in the morning?

A. All the wood was aboard.

Q. 67 Was it all trimmed?

A. No Just a small amount.

Q. 68. What did you see when you came down at seven o'clock that morning? And what did you do?

A. I had the boss stevedore just level off the wood so the men could walk back and forward the ship's crew. There was some wood lying about that wasn't quite level.

Q. 69. Did you go aboard the ship?

A. Yes, sir.

Q. 70. What did you observe with reference to how the cargo was loaded, as to starboard or port? When you went aboard at seven o'clock?

A. On the after deck there seemed to be considerable more wood to the port side. It was close to the house on the after deck. That was the highest. On the forward end of the after deck on the port side. It was four feet higher than it was on the after end of the same deck at the starboard side.

Q. 71. What that difference in height—— How much weight would that be, in your opinion, if you know?

A. It would be hard to say exactly. Thirty to forty tons.

Q. 72. Did you notice anything on the forward deck?

A. The same condition existed, only not so exaggerated. There was less on the port side forward.

[fol. 40] Q. 73. Was the ship on an even keel that morning?

A. No.

Q. 74. How was she?

A. She had quite a list to starboard.

Q. 75. Opposite from the way she was more heavily loaded?

A. Yes, sir.

Q. 76. How long did you stay aboard ship?

A. A few moments. A few minutes.

Q. 77. Was any change made in the trimming of the cargo from the time you left her that morning until she sailed?

A. No. I was aboard her again before she sailed, and I noticed no change.

Q. 78. Where were you when the ship sailed?

A. I was standing on the coal wharf. A wharf that is at right angles with the loading wharf.

Q. 79. Tell the Court in your own language what you observed? How did she leave?

A. She backed away from the wharf.

Q. 80. And at the time she backed, did she have any list?

A. She had a list as she started backing.

Q. 81. How?

A. To starboard.

Q. 82. Just the same as when you left her?

A. Yes, sir.

Q. 83. Now, go ahead?

A. As she backed away to the turning point, she would come up almost on a level keel slowly and then drop back to starboard. Weaving. Four times she made that movement. She backed away. Then as she stopped backing and started ahead, after she had gone three lengths or so she listed over to the port side, I thought, worse than she had listed to the starboard when she backed away.

Q. 84. That is the condition you last saw the ship in, prior to the accident?

A. Yes, sir.
Q. 85. Listed to port?
A. Yes, sir.

The Court: Listed to port?
A. Yes, sir.

Q. 85. What was the custom or practice at Murray as to putting on lashings? By whom are they placed? By the ship's crew or by the company's men?
A. Always by the ship's crew.
Q. 87. And that was done in this case?
A. Yes, sir.
[fol. 41] Q. 88. Did you observe the Nidarholm after she came back, after she had spilled some of this cargo?
A. Yes, sir.
Q. 89. Did you personally examine the stanchions and lashings at that time?
A. Yes, sir.
Q. 90. Describe to the Court the condition you found them in after the Nidarholm had come back, after she lost that wood?
A. Well, the deck cargo was nearly half gone. It was level with the rail at the outside and rising of it in the center. The lashings, a great number of them, had been broken and were gone entirely. And the stanchions and most of the boards and stuff had been broken away and some were hanging on the sides, and the rest were gone.
Q. 91. Did you notice the lashings on the port side forward?
A. Yes, sir.
Q. 92. What about those?
A. Two of them were gone entirely.
Q. 93. Any more broken?
A. Yes. Two on the starboard side forward and all those on the starboard side aft, and two on the port side.
Q. 94. How many on the port side forward?
A. Two were entirely gone.
Q. 95. What was the condition of the stanchions on the port side forward?
A. They were broken and gone.
Q. 96. Did you notice anything particularly about the bottoms of those stanchions?

A. Yes. They had been pried into the cargo two feet, with the strain of the load. (Indicating.)

The Court: Pried or pushed into what?

A. Where the stanchion sits on the deck and comes up against the rail, it would be probably about as high as the rail of this witness stand. Nearly four feet. And the stanchion had—with the strain of it—the bottom of it had been forced into the wood somewheres from eleven inches to two feet.

Q. 97. The bottom of the stanchion had been forced into the cargo on the deck?

A. Yes. Broken the lashing and pried itself right into the cargo where it was on the deck.

[fol. 42] Q. 98. What, if anything, did that lead you to believe?

Mr. Duncan: I object to that.

Mr. Thompson: I press it, Your Honor.

The Court: Let's see. He isn't a seaman.

Mr. Thompson: A civil engineer. His business is to take charge of putting up these stanchions. The very question involved here is the strength of those stanchions.

Mr. Duncan: When it happened the ship was three miles down stream. He wasn't on the ship when it happened.

Mr. Thompson: It was what did happen as a result of it.

The Court: I have not heard the whole testimony. Has there been any testimony with reference to the actual happening? With reference to what did happen?

Mr. Thompson: The captain testified that the stanchion was broken because of the weakness of the stanchion. I am trying to show that what he observed indicated to him certain things.

The Court: Well, you may ask him——

Q. 99. I will put it this way: Did this condition that you found indicate anything to you as to the strength of the stanchions as compared with the strength of the lashings?

Mr. Duncan: I object to that on the same grounds.

The Court: I think I will exclude it.

(Exception allowed and noted.)

Q. 100. Mr. McKnight, these lashings you have testified went from the center—from about the center of the stanchion—to the ring bolt in the deck.

Mr. Duncan: They went from the board alongside. I understood his testimony to be that the lashings——

Q. 101. Withdraw the question. Where did the lashings run from?

A. From the stanchions and the boards. They were around the board and the stanchion both.

Q. 102. How high up was that?

A. Ten to twelve feet.

Q. 103. About the center of the stanchion?

A. A little above.

Q. 104. Where did it run to on the deck of the vessel?

A. To the hatch coamings.

[fol. 43] Q. 105. What was the purpose of that lashing?

A. To support the stanchions.

Q. 106. And would that stanchion, in your opinion, stand up without the assistance of that wire or lashing?

A. Not very long, with a heavy load.

The Court: You may ask him what would be the effect of the insufficiency of the lashing on the stick.

Q. 107. Assuming, Mr. McKnight, that a lashing on one of those stanchions broke; what effect would that have on the stanchions, in your opinion?

A. It would let them break at the rail, I should expect.

Q. 108. And you found that the butts of the stanchions had been pushed into the cargo?

A. Yes, sir.

Q. 109. Did that indicate a great strain to you, on the stanchions?

Mr. Duncan: I object.

The Court: I don't know that in that form I should admit it. But what objection can there be to your asking him, as a civil engineer, what the effect on the sticks of a strain would be. I think I should admit that question. What would be the effect of a strain.

Mr. Duncan: Well, Your Honor, you will pardon me again; if the question goes no further than this—to indicate

that the condition in which he found the butts of these stanchions was consistent with their having been under a great strain—with there having been a great strain upon them—I don't object.

The Court: What, in his opinion, would be the effect of a strain—a great strain—on the lashings and that stanchion? I think he may answer.

Mr. Duncan: On the stanchion or on the lashing?

The Court: Either.

Q. 110. Mr. McKnight, did you find that same condition regarding the butts of the stanchions being pushed into the cargo on the port side forward?

A. Similar, but not so far.

Q. 111. It was further on the starboard side? Did you find that condition on the port side?

A. There was a similar condition on the starboard side, but not so much as on the port side.

[fol. 44] Q. 112. The butts were pushed farther into the cargo on the port side than they were on the starboard side?

A. Yes, sir.

Q. 113. That is what you mean to say?

A. Yes, sir.

Q. 114. What effect would a heavy strain on those stanchions have on the stanchions themselves?

A. It would have the effect of forcing the top out.

Q. 115. And what would it do to the bottom?

A. Force it in.

Q. 116. Suppose the top broke with the strain. Would you still find the butt in.

A. If the top broke?

Q. 117. Yes.

A. I don't see how it could go in once the top broke off. I don't see how the butt could go in after the top had broken off.

Cross-examination.

Mr. Duncan:

X Q. 1. What kind of wood are these stanchions made of?

A. Fir and spruce.

X Q. 2. Well, do you know which the stanchions on the Nidarholm that broke were made of. Whether they were fir or whether they were spruce?

A. I think they were mixed. Some of each.

X Q. 3. Had the stanchions been used as stanchions before they were used on the Nidarholm?

A. No. They hadn't. They were new.

X Q. 4. Is that the same sort of stuff that your pulpwood is made out of?

A. Similar.

X Q. 5. It is just long poles before they have been cut up?

A. No. We select the stanchions. Send men out to cut them.

X Q. 6. But it is just the same type of wood?

A. Yes, sir.

X Q. 7. How does the wood that you cut up into pulpwood come to the mill?

A. Four-foot lengths.

X Q. 8. Where is it cut?

A. Back in the mountains.

X Q. 9. And those same cutters back there send you big twenty-foot poles?

A. No. We go and cut the poles on the flats. We never bring them in from the woods. They are cut from the lower ground.

[fol. 45] X Q. 10. What do you usually use for these lashings? On other ships? What is the material?

A. Wire. Rope.

X Q. 11. You used chains after these lashings broke, didn't you?

A. Well, I supplied chains to take the place of the lashings.

X Q. 12. Don't you usually supply the lashings?

A. Never, to my knowledge.

X Q. 13. The ships have been accustomed to supply the lashings?

A. Always.

X Q. 14. Did you have any talk with the captain when the Nidarholm first came to the dock about lashings?

A. I believe I told him the way it was customary for lashings; and spoke of this mast lashing.

X Q. 15. Did you ask him if he had any lashings on board?

A. Well, possibly I did. I warned them to be ready to put the lashings on.

X Q. 16. Did you look over the lashings before they were put on?

A. Not particularly.

X Q. 17. Well, did you look at them at all?

A. Yes.

X Q. 18. What did you think of them?

A. Well, they were similar to the lashings used on other boats. I didn't see much difference.

X Q. 19. You say these stanchions were fastened at the foot with hemp rope?

A. Yes, sir.

X Q. 20. Who furnished that rope?

A. The company.

X Q. 21. Does the company usually furnish that?

A. Yes. The company does that. The stanchion lashings.

X Q. 22. Let us assume that that lashing broke. As a matter of fact when you examined the ship after coming back those lashings were broken?

A. Yes. When the stanchions were pried in they broke or that stanchion couldn't go in.

X Q. 23. What would be the effect of that lashing breaking?

A. Well, standing up it would make no difference. The deck cargo is ranked against the foot of the stanchions.

X Q. 24. Assuming the constant weight against the top of these stanchions; they would be more likely to give way if that lashing at the foot broke than as if it held, wouldn't they?

A. If it broke?

[fol. 46] X Q. 25. Yes?

A. It couldn't have broke until there was a considerable list or pressure at the top.

X Q. 26. The stanchion is strong so long as that lashing stood?

A. If it is standing perpendicularly. Yes.

X Q. 27. Do you know how many lashings there were on that ship? Wire lashings?

A. I think about twenty-four.

X Q. 28. Do you know how many of those were broken?

A. Yes. About half of them were broken.

X Q. 29. This is the testimony of the first mate: "Q. did you examine the lashings after the cargo had gone overboard?

A. Yes, sir.

Q. What did you find in regard to that?

A. I found most of them intact.

Q. How many?

A. Seventeen intact and seven broken." And the captain testified to the same thing. Would you say that more than seven of those lashings were broken?

A. Yes, sir.

X Q. 30. You don't know how many?

A. Well, I will say eleven of them were broken.

X Q. 31. On the port deck forward there were two of them that were gone when the ship got back?

A. Yes, sir.

X Q. 32. And the stanchions were gone, too? You don't know whether they were broken or whether they were taken off before the ship got there? They had disappeared entirely?

A. They had gone. Yes.

X Q. 33. Now, when you went on deck on the morning she sailed on this trip, you said it was about four feet higher on the after deck on the port side than it was on the after deck on the starboard side, aft?

A. Yes.

X Q. 34. Well, was there a level distance between those two points? Or was there a hole?

A. No. I just noticed that big hole down at the after end, that should have been filled with wood, I thought, if the boat was loaded right.

X Q. 35. Did you see this ship leave at the time of the trip before this accident took place?

A. I can't say that I did.

X Q. 36. You saw her at the dock before she left?

A. Yes, sir.

[fol. 47] X Q. 37. Did she have a list?

A. Very little. I think a slight list.

X Q. 38. Which way was it?

A. I can't remember. But I think she had a list, a slight list.

X Q. 39. How much of a list to starboard did she have when she left the dock on the trip in question?

A. Five to six degrees; six to seven; I didn't look at the instrument.

X Q. 40. And after she turned around in the stream she went over to port?

A. Yes.

X Q. 41. How far?

A. I couldn't tell. She would be out a copule of hundred yards. She seemed to have more, but it was towards me and I could not say.

X Q. 42. Did she straighten up slowly?

A. When she turned?

X Q. 43. Yes?

A. She straightened three to four times and would go back. Just like that (indicating). Weaving. Then she remained to starboard. As she gathered way about three lengths. Then she went over to port—not then—first came up and then listed over to port. She listed towards me.

X Q. 44. She was going port side towards you; and you think it would be about the same?

A. It would be about the same.

(The hearing here suspended until two o'clock, P. M.)

Afternoon Session, 2 o'clock, P. M.

Redirect examination.

Mr. Thompson:

Q. 118. Mr. McKnight, they were talking something about rope lashings at the butts of these stanchions. What were those rope lashings at the foot for?

A. To support the stanchions while they were put up, and hold them in place until the wood was in place.

Q. 119. They were temporary?

A. Yes, sir.

Q. 120. How are those stanchions held in place after the wood or cargo has been placed on deck?

A. The wood is stowed in ranks against the foot of the stanchion, and the lashings hold the stanchions at the top [fol. 48] and the rail keeps it from shoving out at the bottom.

Q. 121. Could you with the use of this window pull, and using this table as the rail,—the rail of the ship—show what you mean to the Court. I am afraid it isn't plain.

The Court: You mean the rail of the ship?
A. Yes.

Q. 122. Just show us how the cargo held that stanchion in. Assuming that pull is the stanchion and the top of the table is the top of the rail of the ship.

A. The stanchion would come fifteen or sixteen feet above the top of the bulwark or rail. It was lashed right at the rail and lashed again at the bottom; lashed to the rail at the bottom. Then the wood—the deck load—would be ranked against it the whole way up. (Indicating.)

Q. 123. So that the stanchion was held from coming in, and also from going out, by the cargo itself?
A. Yes.

Mr. Duncan: Coming in?
Mr. Thompson: Yes.
A. Lashed to the rail. (Shows the Court.)
Mr. Thompson: What I wanted to bring out was that the cargo itself was holding the foot of that stanchion in.
The Court: Yes.

Recross-examination.

Mr. Duncan:

X Q. 45. Where is that diagram you have? Libellant's 2?

The Court: Did I see that?
Mr. Thompson: Yes. That is the chalk.

X Q. 45 (continued): Take this Libellant's 2; number two hatch; how wide is that ship up there?
A. Approximately nearly forty-five feet up there.
X Q. 46. How wide is that hatch?
A. I should say about twelve feet. Possibly a little more.
X Q. 47. Twelve feet?
A. Yes.
[fol. 49] X Q. 48. So that, assuming this was forty feet up there—
A. Well, it is more. There isn't much taper on these boats.
X Q. 49. Well, you have got quite a good bit of taper drawn there?

A. Well, that isn't to scale.

X Q. 50. Well, this was forty-four feet? And the hatch is right in the middle of the deck, isn't it?

A. Yes.

X Q. 51. So you would have twenty-two feet on one side, less six feet?

A. Yes.

X Q. 52. How high is the hatch coaming from the deck?

A. About two feet. Two and a half probably.

X Q. 53. Where are these rings?

A. In the coaming.

X Q. 54. At the top or bottom?

A. Nearly at the top. About at the top. There is a little roll at the top edge of the top and the rings are in this little roll.

X Q. 55. Now this dotted line on this cross-section: is that supposed to represent the lashing?

A. Yes. Just approximately. It is not to scale.

X Q. 56. Now, going back to the time this ship first came in: You went on the ship and had a talk with the captain?

A. Yes. I talked with him.

X Q. 57. Had you seen the charter party at that time?

A. No.

X Q. 58. Have you ever seen the charter party?

A. No. Not to read it.

X Q. 59. At the time you went on deck at that time to see the captain, when the ship first came in, did you know what the duties of the Oxford Paper Company were with regard to the loading and stowing of the cargo on that ship?

A. No. I knew we had to load and stow the cargo.

X Q. 60. Just what conversation took place between you and the captain with regard to lashings at that time?

A. Well, I can't repeat the words; but I described to him the method used for putting up the stanchions and lashings and fittting the ship up for a deckload.

X Q. 61. What did you say to him about the lashings?

A. Well, I simply described how they were put on.

[fol. 50] X Q. 62. Did you ask him for some lashing?

A. Did I ask him? I didn't ask him. I told him the ship supplied the lashings.

X Q. 63. Did you ask him?

A. I didn't ask. I told him they were to supply the lashings.

X Q. 64. You ordered him?

A. No. I said the ship always supplied the lashing. That it was the custom.

X Q 65. What did he say?

A. He said he would.

X Q. 66. Were you on the deck when they were putting it on? The lashing?

A. No. I saw them from time to time.

X Q. 67. You saw some of them put on?

A. Yes. Some of them.

X Q. 68. These lashings were one inch stee- wire. Was that correct? That was the testimony.

A. Yes. I think probably they had been, but worn down a little maybe.

X Q. 69. How were they made fast to the ring-bolts?

A. They were knotted and fastened with clamps. Some had buckles in the ends and were lashed around the timbers.

X Q. 70. You mean some of them they knotted?

A. Yes.

X Q. 71. Some didn't have clasps?

A. Some did and some didn't. At the end of the rope they were knotted and seized down.

X Q. 72. How were they fastened around the stanchions?

A. Passed around two timbers and the stanchion together. The supporting timber and the lashing.

X Q. 73. How was the loose end made fast?

A. The loose end was lashed down. And then, in a few cases, there were clamps, if the wire was short.

X Q. 74. And in the other cases?

A. There were three or four hitches and seized to the main line.

X Q. 75. When they first started to put up these stanchions and lashings did the captain ask you how you wanted them fastened?

A. No.

X Q. 76. Did he ask you where you wanted the lashings put?

A. I told him, in my description, to put them opposite the hatches; where the hatch lashings went on.

[fol. 51] X Q. 77. Did he put them as you asked him?

A. They were about as we required them. Yes.

X Q. 78. When you piled the wood on the ship—the deck load, or deck cargo—after these lashings were put up, how was it piled, with reference to these lashings? Was it fitted underneath the lashings?

A. Yes. Piled to the rail in tiers— Up to the rail it is piled right across the deck. Understand? When you get to the rail, against the boards there are lengths put endwise, after you get above the rail of the ship.

X Q. 79. How is this portion of the deck cargo, above that lashing, supported? Does it rest on the lashing?

A. The lashing is in with the wood.

X Q. 80. Yes. But this wood is piled way above the lashing?

A. Yes.

X Q. 81. The weight of this wood up here is on the lashing?

A. No. It is underneath it. The bottom tiers support the top tiers. Naturally.

X Q. 82. You don't understand me, I think. How does the lashing get there?

A. It is fitted around the lashing. The wood is.

X Q. 83. So there is an open space?

A. No. No open space. It is fitted. Possibly some wood might rest on it. But it is generally supported by the wood underneath.

X Q. 84. Well, unless there is an opening through which that lashing can go, there must be some wood resting on it?

A. It can be fitted into that. The wire isn't——

X Q. 85. Well, you have to fit that so there won't be any weight on it?

A. Yes.

X Q. 86. Was that done in this case?

A. Certainly. It must be done. It is always done.

X Q. 87. On the first two trips of the Nidarholm is it true that the lengths of pulpwood were stowed with their length running fore and aft?

A. From the rail down?

X Q. 88. The whole deck cargo?

A. The deck cargo is stowed in two different directions. Up to the top of the rail the ranks would be piled crossways.

[fol. 52] X Q. 89. Or thwartship?

A. Yes.

X Q. 90. How about the rest of it?

A. From the rail up about two or three tiers on the outside it would be piled the opposite way. The rest would be the same way. The same way as the bottom.

X Q. 91. Did you make any change in that method in laying the wood after this loss; on the third trip?

A. No. Not that I know of.

X Q. 92. Do you know of any such change being made?

A. No. I don't know of any.

X Q. 93. Well, the captain has testified that there was a change. Would you say there was or wasn't; or simply that you don't know?

A. There might have been. If there was, it was at his request. It wasn't at mine.

X Q. 94. Now, when the ship came back to Murray for her third and last trip, there was a change made in the size of the stanchions, was there not?

A. Yes.

X Q. 95. And you put up larger stanchions? Of greater diameter?

A. Yes. The captain requested larger stanchions; wanted to know if he couldn't get larger stanchions. He seemed to think it was the safest plan.

X Q. 96. And you got larger stanchions at that time?

A. Yes. We did, at his request.

X Q. 97. You went out and got some chain to use for lashing?

A. Yes.

X Q. 98. Did you buy the chain?

A. Yes. The company bought it.

X Q. 99. The company bought it?

A. Yes.

X Q. 100. Where is it now?

A. I believe it is up at Murray.

X Q. 101. You took it off the ship after the trip was completed?

A. Yes. It was taken off at Portland. I believe it was returned.

X Q. 102. Who made the decision to buy that chain? Did you?

A. Well, we got it——

X Q. 103. Can't you answer my question?

A. I can't say who made it. By Mr. Harvey, or myself, or both.

[fol. 53] X Q. 104. Why did you do it?

A. To replace the wires that were lost when this cargo went overboard on the second trip.

X Q. 105. Did you buy only enough chains to replace that?

A. We bought eight chains, I think.

X Q. 106. And for the rest of it you used what?

A. The wires that remained from the other trip. Doubled them up and used them over again.

X Q. 107. How much cargo did you put on the Nidarholm on the third trip; with relation to the amount? With relation to the amount that was on her the trip when the loss occurred?

A. I don't know exactly.

X Q. 108. Was there more or less?

A. Less.

X Q. 109. How much less?

A. I couldn't say that, of course. I haven't got the figures. Possibly there is a record of it, but I haven't got it. A little less.

X Q. 110. Have you had any experience with losing deck cargoes on other ships which were loaded by the Oxford Paper Company?

A. No. Not since I have been there. It was previous to my being there—any losses.

X Q. 111. You heard the other witness referring this morning to the loss of the steamer Tuckerhoe?

A. Yes, sir.

X Q. 112. You weren't there when this occurred?

A. No. I wasn't there.

Mr. Thompson: I think that other witness said the Tuckerhoe acted cranky like that ship. No evidence of a loss. As I recall the testimony. I think I am right on that.

X Q. 113. Do you know whether or not there was a loss on the ship called the Tuckerhoe?

A. I don't know.

X Q. 114. Did you prepare a ship called the Gustav Biegland? Did she load a cargo for the Oxford Paper Company while you were there?

A. No.

X Q. 115. Or the Certo?

A. Not since I have been there.

X Q. 116. You have been there how long?

A. Two years loading. I think I was there a year surveying before that. Last year and this year loading.

[fol. 54] X Q. 117. When the ship came back to the dock after the loss were there on board her any of these long stringers that had been spiked to the outside of the stanchions?

A. Yes. Some were there.

X Q. 118. Were they broken or whole?

A. They were intact on the starboard side forward. One of them was hanging in one of the wires remaining.

X Q. 119. Well, were they intact in other places?

A. No. Practically everything had gone.

X Q. 120. Had disappeared or had broken?

A. Had gone overboard.

X Q. 121. So that the only ones of those long stringers that you saw were on the forward starboard side?

A. Yes, sir.

X Q. 122. And they were intact?

A. Yes.

X Q. 123. Were they still spiked to the stanchions?

A. No. Torn off the stanchions; hanging on a piece of the stanchion; one stringer and the cable. Locked together.

X Q. 124. They had pulled out the spikes?

A. No. The cable had broken and they were hanging in the opposite end of the cable.

X Q. 125. I didn't get that. You say they were hanging by a cable?

A. Yes, sir.

X Q. 126. And you say— Yet you say a minute ago, that the cable had broken?

A. Yes.

X Q. 127. How could they be hanging by the cable, if it was broken?

A. I can describe to you, if it is permissible, how it was done?

X Q. 128. Go ahead?

A. Some of the cables, where they were long, would be taken up at one point from the fastening of the hatch coaming and looped around the stanchion and the supporting timber; and then go along behind the supporting timber, be looped around the same timber and the stanchion at another point, and then go back to the hatch coaming, the opposite end of the wire. And in one case where this wire only broke

at one end that timber was hanging in the wire. And a piece of the stanchion.

[fol. 55] X Q. 129. The lashing around the stanchion and the longitudinal heavy timber—that was undisturbed?

A. Yes.

X Q. 130. How do you reconcile that with your statement a moment ago that this longitudinal timber had been pulled loose?

A. Well, it had broken loose from the ship and was hanging in the opposite end of the wire.

X Q. 131. But, so far as its joining with the stanchion, that was intact?

A. That was intact. Yes, sir.

Redirect examination.

Mr. Thompson:

Q. 124. Was the weather good at the time the ship left? Smooth?

A. Yes. It was good.

Q. 125. Have you used the stanchions on other ships that were cut at the same time as those on the Nidarholm?

A. Yes, sir.

Q. 126. What ship?

A. Fram; Harold Vang.

Q. 127. Are those the same size stanchions and cut at the same time?

A. Yes.

Q. 128. Have any trouble with those?

A. No.

Q. 129. How many trips did any of those ships make with any of those same stanchions?

A. The Harold Vang made eight or nine trips.

Q. 130. Was the pulpwood in this case placed the same as it was on these other ships that you have mentioned, and all the time during your experience?

A. Exactly the same.

Q. 131. Some testimony was made by the captain, Mr. McKnight, that the reason he didn't put this cross-wire in between the two hatches was because the pulpwood is supported by the shrouds or rigging?

A. Well, he might have thought so. I don't think it was much support.

Q. 132. Why don't you?

A. Well, the rigging at the height of the deck load is in two-thirds of the way from the mast, and is wider apart.

[fol. 56] Q. 133. So that a large part of your pulpwood was outside the rigging?

A. Yes.

Q. 134. Has the captain made any request of you for different stanchions or anything that you didn't grant?

A. No.

(Witness excused.)

Hector J. Carmichael, witness for the libellant, was duly sworn and testified as follows:

Direct examination.

Mr. Thompson:

Q. 1. Your name is what?

A. Hector J. Carmichael.

Q. 2. You live in St. Anne's, N. S.?

A. Yes, sir.

Q. 3. What is your business?

A. Pilot.

Q. 4. You are a pilot in St. Anne's Bay?

A. Yes, sir.

Q. 5. Have you had any seagoing experience otherwise than as a pilot?

A. Yes. Quite a lot.

Q. 6. What class of vessels have you sailed on?

A. Steamboats. Some schooners.

Q. 7. How long have you been a pilot in St. Anne's Bay?

A. Three years.

Q. 8. And during that time you have been there would you attempt to say how many ships you have piloted out of St. Anne's Bay or in?

A. About half of them. I couldn't say exactly.

Q. 9. What's that?

A. Half the amount that went in there.

Q. 10. Well, I don't know what that is, Pilot?

A. Well, it must be forty to fifty.

Q. 11. Were you the pilot on the steamship Nidarholm at the time she lost this deckload?

A. Yes, sir.

Q. 12. Do you remember what date it was?

A. July 7th, 1927.

Q. 13. What time did you go aboard the ship that day?

A. Twelve o'clock, noon.

Q. 14. How long after that before the ship left?

A. We left about twelve-thirty.

Q. 15. Describe the condition of the ship as to even keel or list at the time you went aboard?

A. She had quite a big list to starboard.

[fol. 57] Q. 16. Did you speak to the captain about it?

A. Yes. I called his attention to it.

Q. 17. Nothing more than that?

A. Not at that time.

Q. 18. You then started your duties as pilot?

A. Yes, sir.

Q. 19. The ship was lying with her starboard side to the dock when you went aboard?

A. Yes, sir.

Q. 20. And will you explain to us, in order, just what manœuvers you made on that ship—in the handling of her—in order to get her turned around to come ahead?

A. I went slow astern just until we got clear of the end of the pier. With the rudder amidships. And when we got clear of the end of the pier we went full speed astern, with the rudder amidships.

Q. 21. What did that do to the ship?

A. It turned her stern around to starboard.

Q. 22. Turned her stern to starboard?

A. I mean to port.

Q. 23. And her bow swung to starboard?

A. Yes, sir.

Q. 24. And during the entire manœuver you left your rudder amidships, depending on your propeller to swing her?

A. Yes, sir.

Q. 25. How did the Nidarholm act during the manœuver backing?

A. When the engines went full speed astern she come up four or five times. She would almost come up on an even keel, and then she would go down.

Q. 26. Have you in your experience seen a vessel act that way before?

A. No, sir.

Q. 27. After you got the ship backed around, what did you then do?

A. We come full speed ahead with helm hard-a-port.

Q. 28. Now, what happened to the ship regarding the list?

A. She come up on even keel and took a big list over to port.

Q. 29. Did she do that pretty quickly?

A. Well, fairly quickly.

Q. 30. State what you did up to the time you first saw some of the pulpwood going over?

A. Well, we kept on down the harbor and——

[fol. 58] Q. 31. How was the list?

A. Well, I think she was increasing the list to port.

Q. 32. Was your course fairly straight?

A. Yes. Right straight.

Q. 33. Did you move your helm much?

A. No. Not to amount to anything. Probably a little bit to keep the ship straight.

Q. 34. Go ahead?

A. Until we got down to the sharp turn in the channel, and we put the helm hard-a-port and she listed over more than ever to port.

Q. 35. Listed more to port with that helm?

A. Yes. Until I saw some of the wood fall out.

Q. 36. Did you give the order for hard-a-port at that time?

A. Yes, sir.

Q. 37. And was the order complied with?

A. Well, I think so.

Q. 38. You think it was?

A. Yes, sir.

Q. 39. Where were you standing as you went down the harbor, and who was with you?

A. I was standing in the wheelhouse in front of the wheelsman.

Q. 40. The man at the wheel?

A. Yes.

Q. 41. Where was the master?

A. The master was out on the bridge.

Q. 42. Were the windows open in the pilothouse?

A. Yes.

Q. 43. Were any members of the crew, so far as you know, around there? Other than you have mentioned?

A. He called the mate up on the bridge, and they were talking about—I couldn't understand exactly—but they were looking at the "tattle-tale" on the binnacle.

Q. 44. What is that "tattle tale" for?

A. To show how many degrees list she has.

Q. 45. From the time you came ahead, after you finished your backing there at the dock, until part of this cargo went overboard, how long a time elapsed?

A. About twenty-five minutes.

Q 46. Had you noticed anything about the master of that ship during that time? How did he act during that time? [fol. 59] A. Well, he used to walk out on the bridge and then he would look at his "tattle tale"——

Q. 47. To see the list of the ship?

A. Yes.

Q. 48. And how many times during the twenty-five minutes did he do that?

A. Five or six times.

Q. 49. Are you sure of that?

A. Yes, sir.

Q. 50. Now, what is the first you knew about this pulpwood going overboard? The very first?

A. Well, I first happened to notice it; I heard some noise, and I looked down on the deck, and the pulpwood was falling out I should say half ways between the forward part and the bridge. Half way between forward and the bridge.

Q. 51. That is where you first saw it going overboard?

A. Yes, sir.

Q. 52. And about where was that with reference to the mast? The foremast?

A. Well, it would be very close. Around opposite the foremast.

Q. 53. On the port side?

A. Yes, sir.

Q. 54. Now what happened from that time on, until you started back again?

A. Well, there was quite a lot of wood went over. I didn't look aft. I don't know what went off aft, but she took a big list over to starboard and she cleaned off everything on the starboard side forward. I don't know how

she did aft. I didn't look aft. And then she listed back again to port and she cleaned off all that was forward above the rail. And I believe she did the same thing aft, because there was nothing aft left above the bulwarks. Everything above the bulwark was cleaned off.

Q. 55. What was the list of the ship at the time you noticed this pulpwood go, compared with any time previous?

A. There was quite a bit more. She listed over considerable.

Q. 56. The captain testified, if I understood him correctly, that at the time the pulpwood first started over you were going over the bar. What was the depth of water at the place where this cargo first started to go over?

A. It is between thirty-five and thirty-nine feet.

[fol. 60] Q. 57. The captain testified that the depth of water was only about twenty-four feet where the pulpwood first started?

A. That isn't right. We were not at the bar. We were about a thousand feet above the bar. If we were at the bar—if we had been at the bar—that would be about the depth of water.

Q. 58. If you had been at the bar?

A. Yes. But we were about a thousand feet above the bar.

Q. 59. Are you sure of that?

A. Yes, sir.

Q. 60. Whether or not, in your opinion, the Nidarholm at the time she left the dock was seaworthy?

A. Well,——

Q. 61. Whether or not in your opinion she would have ever reached Portland with the cargo on her deck?

Mr. Duncan: I object. I don't think this man has qualified to answer such a question.

The Court: What examination did he make?

Mr. Duncan: He didn't make any examination.

Mr. Thompson: He didn't make any examination. No. But he knew about the way the ship was acting all the way down.

Mr. Duncan: You will have to qualify him as to his experience——

The Court: Well, ask him.

Q. 62. What class of vessels have you been in as pilot?
A. As pilot?
Q. 63. Yes?
A. Well, all them Oxford pulp boats.
Q. 64. Of the same general type as the Nidarholm?
A. Larger and smaller. Yes.
Q. 65. And what class of vessels have you been in as a member of the crew?
A. I have been in steamboats from 8,000 tons down.
Q. 66. In what capacity?
A. As able seaman.

The Court: What experience has he had on ships of that character carrying wood?
A. Well——

Q. 67. Have you had any experience other than as pilot on pulpwood carriers?
A. No, sir.

The Court: Well, what experience has he had, as pilot, to observe these ships?

[fol. 61] Q. 68. What kind of ships have you piloted down there?
A. Well, pretty much the same as this. Some of the larger and some would be smaller.
Q. 69. And the deck cargoes about the same?
A. Yes. I would say the same. Similar.
Q. 70. And you have done it for some thirty-five to forty ships?
A. I think so.
Q. 71. Now, whether or not in your opinion, based on your observations on the morning that you piloted the Nidarholm down when this loss occurred, in your judgment that ship would have reached Portland harbor with that deck load on her?
A. Well, I don't think she would.
Q. 72. You don't think she would?
A. No.
Q. 73. And why not?
A. On account of the list she had.
Q. 74. Have you, in your experience in piloting vessels over these same waters, with this same kind of cargo, seen vessels act the same as the Nidarholm did at that time?

A. No, sir.
Q. 75. You never did?
A. No, sir.

Cross-examination.

Mr. Duncan:

X Q. 1. The captain testified, I think, that the ship had a list of five degrees to port after she straightened out in the stream and started down the bay——

A. I didn't look at the degrees——

X Q. 2. Wait. I haven't finished my question. Are you prepared to say she had a greater list than that?

A. I think she did.

X Q. 3. How much greater?

A. Well, I would think that she had eight or nine degrees, going down the harbor.

X Q. 4. I am talking about the list she took immediately after she straightened out. The captain testified that he looked at the clinometer and it showed a list of five degrees to port. Did you look at the clinometer?

A. No sir. I didn't.

X Q. 5. Where was the binnacle?

A. Right behind me. Between me and the wheelsman. Right in front of the wheelsman.

[fol. 62] X Q. 6. What was on that binnacle?

A. Well, the compass. On top of it.

X Q. 7. And the clinometer?

A. I imagine it was, but I didn't look at it. That is something I didn't look at. I saw the captain looking there.

X Q. 8. How far was it from the dock down to the place where the cargo was lost?

A. Well, it would be about three miles. Three and a half probably.

X Q. 9. As soon as you had straightened out in the stream this ship took the list to port that the captain says was five degrees and you say was how much——?

A. Well, I am not saying exactly how many degrees. But I would think eight degrees anyway.

X Q. 10. Now she carried that for quite a while without any change?

A. Well, I thought she increased the list.

X Q. 11. Well, did it increase right away?

A. No. Gradually, I would say.

X Q. 12. And the increase was mostly just before the loss?

A. Yes. Yes. When the wheel went to port.

X Q. 13. Before you went to port how much list did she have?

A. Eight or nine degrees.

X Q. 14. Did you look at the clinometer then?

A. No, sir.

X Q. 15. Now, when you went to port she heeled over more to port. And how far did she go then?

A. I couldn't say exactly. Quite a ways.

X Q. 16. Did you look at the clinometer then?

A. No.

X Q. 17. You didn't look at that at any time?

A. No, sir. I was too much interested in the ship.

X Q. 18. You don't know, then, how far over she was to port at the moment the cargo on the port side forward went overboard?

A. I couldn't tell you exactly how many degrees she went over.

X Q. 19. The captain testified that she was over to ten degrees when the cargo went over? Does that sound reasonable?

A. I would think she would have a lot more.

X Q. 20. How much more?

A. I would think three or four more degrees, when it was spilled off.

[fol. 63] X Q. 21. Now, have you ever been on a ship with a deck cargo similar to this?

A. Yes, sir.

X Q. 22. But you never have been out of the bay with one?

A. Which bay?

X Q. 23. St. Anne's?

A. Yes. I have come down on a lot of them with the same kind of cargo.

X Q. 24. As pilot?

A. Yes.

X Q. 25. But when did your piloting duties end?

A. Just when we get outside the bar.

X Q. 26. I think you said you had never shipped except as pilot?

A. Beg pardon?

X Q. 27. I think you said you had never shipped except as pilot on a steamship with a deck cargo. If I am wrong, correct me.

A. That is what I told you, sir. Yes, sir.

X Q. 28. Now, have you been to sea, as a seaman, in ships of similar size as the Nidarholm?

A. Well, in steamboats. I was in bigger steamboats.

X Q. 29. You have been to sea on bigger steamboats than the Nidarholm?

A. Yes, sir.

X Q. 30. Have you ever been on such a steamboat in any rough weather?

A. Yes, sir.

X Q. 31. When the ship rolled about?

A. Yes, sir.

X Q. 32. Now, assuming that we have a little rough weather—I am not talking about a hurricane or anything like that—but as you would call it half a gale; how far would you expect a ship as big as the Nidarholm or bigger to roll?

A. Well, they will roll quite a lot, sometimes.

X Q. 33. They will go over twenty or thirty degrees, won't they?

A. Sometimes they do. Yes, sir.

X Q. 34. So, if you take a ship as big or bigger than the Nidarholm out to sea you have got to be prepared to have that ship go twenty or thirty degrees off the perpendicular, have you not?

A. Yes, sir.

X Q. 35. What was the first thing that came to your attention with regard to that cargo going overboard? You [fol. 64] heard a loud noise, didn't you?

A. No, sir. I didn't hear a loud noise. I heard a little noise.

X Q. 36. And did that direct your attention to the deck cargo forward?

A. Yes, sir.

X Q. 37. What was the nature of that noise?

A. Well, the wood spilling off it. That is all I heard.

X Q. 38. You didn't hear a crack?

A. No, sir.

X Q. 39. You were in the wheelhouse?

A. Yes, sir.

X Q. 40. The captain was on the bridge?

A. Yes, sir.

X Q. 41. Could he see the compass unless he came into the wheelhouse?

A. No, sir. He couldn't.

X Q. 42. Could he tell the course the ship was taking unless he came into the wheelhouse?

A. Well, not very well. No.

X Q. 43. When you heard that noise did you go out on the bridge?

A. No, sir.

X Q. 44. Did you stay in the wheelhouse all the time?

A. Yes, sir. Until she started to go over to starboard.

X Q. 45. You went out then?

A. Yes, sir. I went out on the other side of the bridge.

X Q. 46. That ship had wind-shield up in front of the bridge? A piece of canvas?

A. Yes.

X Q. 47. How high up did that come?

A. About something like that. (Indicating.)

X Q. 48. Almost up to your chin?

A. Yes, sir.

X Q. 49. And how far back from the forward end of the bridge was the wheelhouse?

A. If I remember right the wheelhouse—the bridge goes from the door of the wheelhouse. It isn't forward of the wheelhouse at all.

X Q. 50. Where were you standing in the wheelhouse?

A. About amidships in the wheelhouse. Forward. At the front window.

X Q. 51. The wheelsman was behind you?

A. Yes, sir.

X Q. 52. You were right at the window?

A. Yes, sir.

X Q. 53. Which side was the captain on?

A. The captain was on the starboard side of the bridge.

[fol. 65] X Q. 54. As you looked out could you see the cargo in front of you?

A. Yes, sir.

X Q. 55. Could you look all over it?

A. Yes, sir.

X Q. 56. How far over did this ship go when she rolled to starboard after the first port cargo had gone overboard.

A. She went over quite a bit. I couldn't say exactly how far she went over. So far that I thought she wasn't going to come back.

X Q. 57. Do you know what kind of a ship this was?

A. Yes. I have an idea.

X Q. 58. Was she a flat-bottomed ship; she was, wasn't she?

A. I dont' know, sir. I imagine she would be. Most of these ships are.

The Court: Do you know what she drew?

A. 21.5 aft. I don't know how much she drew forward.

X Q. 59. Assuming she was a flat-bottomed ship with perpendicular walls and she had a five to ten degree list on her; would she be more or less stable in that position than she would be if she were absolutely straight?

A. I don't think so.

X Q. 60. You think she would not be as stable?

A. No. Not in my opinion.

X Q. 61. It would be true, wouldn't it, that with a five to ten degree list, she would have more surface under water?

A. On one side. Yes, sir.

X Q. 62. You say that when this loss occurred you were about a thousand feet from the narrows?

A. From the bar. Yes, sir. We had passed the narrows.

X Q. 63. You had passed the narrows?

A. Yes, sir.

X Q. 64. The bar isn't at the narrows?

A. No, sir.

XQ. 65. It is below?

A. Yes, sir.

X Q. 66. What was the occasion for putting your wheel hard to port?

A. We have got to come around the shoal; we have got to get out to the starboard side to get down through this narrow channel.

X Q. 67. Where was this shoal? Were you right opposite that shoal when you put the help hard-a-port?

A. Yes. Just passing the shoal. Just passing the buoy on the shoal.

[fol. 66] X Q. 68. Well, had the water shallowed a good bit just before the loss?

A. No sir.

X Q. 69. What is the general depth over the three miles from the deck down to where the loss occurred? Is it an even depth or does it vary?

A. It varies from six fathom to fourteen fathom.

X Q. 70. And what was it, did you say, at the place where the loss occurred?

A. About thirty-five feet.

X Q. 71. Now, it is true, isn't it, that if a ship gets into shallow water she is harder to handle?

A. Yes.

X Q. 72. How shallow does the water have to be to have that effect?

A. Well, I would judge it would have to be about within a foot or a foot and a half of the bottom to have much effect.

X Q. 73. At the time this loss occurred, in your opinion, did the depth of the water have anything to do with the action of the boat?

A. No, sir. To my mind.

X Q. 74. Your opinion is that the hard-a-port helm is what made her sag down?

A. Yes, sir.

X Q. 75. Now, did you take this boat out the first time she came up there?

A. No, sir.

X Q. 76. Who did?

A. Another pilot.

X Q. 77. Did you take her out the third trip?

A. No, sir. That is the only time I took her out. I took her out the next day after that again.

X Q. 78. I see. Did she have a list then?

A. No.

X Q. 79. She didn't have a full deck cargo?

A. No.

X Q. 80. Do you want to say that in all these ships with pulpwood deck cargoes that you have taken out, this is the only one that ever had a list?

A. No, sir.

X Q. 81. Some of them have had a list?

A. Some of them. But not very many.

X Q. 82. But some of them have?

A. Some of them. But not very many.

X Q. 83. Not many have a list?

A. No sir.

X Q. 84. What has been your experience, with those that have lists, as to the amount of the list?

A. Well, all that I have taken out that had lists, what- [fol. 67] ever list they had at the dock they kept it and stayed at pretty much the same shape.

X Q. 85. It is true, isn't it, that if a vessel carrying a deck load has a list to port, and you throw her helm over hard-a-port, she will sag down a little bit as long as the helm is held there?

A. Yes, sir.

X Q. 86. And these other ships that had a list, they acted the same way, didn't they?

A. Yes. I believe they did, to a certain extent.

X Q. 87. So when you say that these other ships kept the list that they had when they left the dock; you now want to qualify that and say that when the helm is hard-a-port they would sag down?

A. Perhaps they might go a little, but I never seen any go as far as this one did.

X Q. 88. You never saw any go as far, but you have seen them do it?

A. Yes.

X Q. 89. Did you say you had brought forty to fifty ships out of St. Anne's Bay?

A. I wouldn't be sure, but I have taken half the ships out.

X Q. 90. How long have you been at it?

A. Three years.

X Q. 91. What proportion of the ships that you bring out are ships with cargoes for the Oxford Paper Company?

A. Sir?

(Question repeated by reporter.)

A. All of them big ships, sir.

X Q. 92 All of them?

A. Yes, sir. That is the only large ships that goes in there.

X Q. 93. As you looked down at the forward deck and you heard that noise, won't you describe, just as accurately as you can, what you saw?

A. Well, I just saw the wood fall down. Fall off into the water.

X Q. 94. When you first looked out there did you notice the condition of any of the stanchions?

A. No.

X Q. 95. Did you see any stanchions broken and hanging down outside the rail?

A. No. I couldn't see it from where I was.

[fol. 68] X Q. 96. Was this wood going overboard between the stanchions; or had some of them broken, when you looked over?

A. Oh, yes. I believe they had broken.

X Q. 97. The wood couldn't get out of there without some of them breaking?

A. No, sir.

(Witness excused.)

Redirect examination.

Mr. Thompson:

Q. 76. You are not in the employ of the Oxford Paper Company?

A. No, sir.

Q. 77. In whose employ are you? A regular bay pilot, licensed for that work?

A. Yes, sir.

Q. 78. Is there any harbor commission up there?

A. Yes, sir. St. Anne's Harbor Commission.

Q. 79. Are you a member of it?

A. Yes, sir.

Q. 80. What was the weather at that time?

A. Very smooth.

Q. 81. What was the width of the channel where this pulp-wood first started to go? Was it wide or narrow?

A. Wide.

Q. 82. Mr. Duncan has talked about the windshield going around the forward end of the bridge. There was no windshield in front of the pilothouse, was there?

A. No, sir. Both sides.

Q. 83. That simply covers the wings of the bridge?

A. Yes, sir.

Q. 84. So your view wasn't obstructed at all?

A. No, sir. It wasn't up that day, anyway. Because the wind was aft of us.

Q. 85. You said this ship acted differently from any other ship you piloted down there. How did she act differently?

A. Well, she acted kind of funny. Having the starboard list at the dock and then wabbling the way she did coming out of the dock, and then taking the port list. She seemed to be cranky.

Recross-examination.

Mr. Duncan:

X Q. 98. Did the ship Nidarholm, at any time before the first cargo went overboard, have a list to port of more [fol. 69] than fifteen degrees?

A. I couldn't tell you, sir. I didn't see the instrument.

X Q. 99. No. On the trip when the loss occurred. You have already testified, I believe, that she had, you thought, a little more than five degrees?

A. Yes, sir.

X Q. 100. Now, what I am trying to get at is this: How much list did she have; what was the greatest amount of list she had prior to the time when the cargo on the port side forward went off?

A. Do you mean before the wheel went over to port?

X Q. 101. No. I mean at any time prior to the time the cargo on the port side forward went off? The first cargo to go?

A. I couldn't say, exactly.

X Q. 102. The captain testified that it was ten degrees, and that he saw it on the clinometer?

A. When the wheel went over to port.

X Q. 103. After you had gone hard-a-port with your helm and she sagged down a little bit, and then the cargo went?

A. Yes, sir.

X Q. 104. Now, just before the cargo went, what was she?

A. I don't know, sir. And he don't know either, because he was out on the bridge at the time and he didn't have time to come in before she was over——

X Q. 105. He has testified that she had a ten degree list.

Now, I am asking you—giving you that information and asking you what list she had?

A. I couldn't tell you exactly, but I would say a lot more than ten degrees.

X Q. 106. How much more?

A. Three or four more.

The Court: He has gone all over that repeatedly.

Redirect examination.

Mr. Thompson:

Q. 86. Where was the captain when that pulpwood started to go?

A. He was on the starboard side of the ship. Of the bridge.

Q. 87. Of the starboard wing?

A. Yes, sir.

The Court: And you have been all over that, too.

(Witness excused.)

[fol. 70] Gordon S. Harvey, witness for the libellant, was duly sworn, and testified as follows:

Direct examination.

Mr. Thompson:

Q. 1. What is your full name, Mr. Harvey?

A. Gordon S. Harvey.

Q. 2. Live at Murray?

A. At Murray, Victoria County, Nova Scotia.

Q. 3. Position?

A. General superintendent for the Oxford Paper Company.

Q. 4. At Murray?

A. Yes, sir.

Q. 5. How long have you been there?

A. Officially in that capacity for two years, and previously employed with them since 1916; December 1st.

Q. 6. Over ten years?

A. Yes, sir.

Q. 7. During that time have you any idea how many ships have loaded there for the Oxford Paper Company with pulpwood?

A. Around 150.

Q. 8. Are you personally familiar with the method of preparing a ship for loading, as regards stanchions and lashings and so forth?

A. Yes, sir.

Q. 9. Were you personally familiar with the way the Nidarholm was prepared for receiving a deck cargo?

A. In a general way. As much as I could be in the position I had. I was on board and saw the stanchions, but I didn't notice them any more particularly than any others.

Q. 10. How did the way the Nidarholm was arranged compare with the ordinary run of ships that you have prepared up there?

A. The exact same way, so far as I know. All the stanchions were taken from a quantity of possibly 200, and I wouldn't have any reason to think they were any other than the ordinary.

Q. 11. During the time you have been there you have loaded 150 ships?

A. Yes, sir.

Q. 12. All bound to Portland?

A. All bound to Portland. Yes, sir.

[fol. 71] Q. 13. And have you ever lost a deck cargo other than the Nidarholm?

A. Well, there was one steamer—I believe it was the Certo—she lost part of her deck cargo somewhere between Bird Island and Portland.

Q. 14. Do you know the cause of that?

A. Heavy weather.

Q. 15. Do you know whether the steamer Nidarholm had been ashore just prior to the first arrival at Murray?

A. Officially, no. I didn't see her. But I have official information that she was ashore.

Mr. Duncan: I object. May I say one word? That I put in the evidence of my captain and the first officer without knowing anything about this. I don't understand why I shouldn't have been informed, but I am not at the present time.

The Court: He hasn't made any ——. Well, go on.

Mr. Duncan: For that reason I can't admit the stranding until I find out something about it.

Q. 16. Were you informed by the captain of the Nidarholm that she had been ashore?

A. I can't recall that he just definitely stated he was ashore, but we discussed business matters in connection with him being ashore, in so far as the amount of coal he used while he was aground there was concerned. I know we considered if we used coal there to get the steamer off the company should have paid for it. And—

Q. 17. Well, you discussed that matter with the master?

A. Yes, sir. She was on a charter party.

No cross-examination. (Witness excused.) (Hearing adjourned.)

[fol. 72] [Title omitted]

Hearing January 18, 1928

Hearing before Hon. Clarence Hale, U. S. District Judge, beginning at nine thirty o'clock, A. M., on the above date, previous testimony on both sides in this case having been taken out by deposition on August 4th and other dates.

Edwin Charles Bennett, witness called by the libellant, having been duly sworn, testified as follows:

Direct examination.

Mr. Thompson:

Q. 1. What is your full name?

A. Edwin Charles Bennett.

Q. 2. What is your home address?

A. My home address is Leonia, New Jersey.

Q. 4. What is your occupation at the present time?

A. Naval architect and consulting marine engineer.

Q. 5. Where?

A. At 30 Broad Street, New York City.

Q. 6. Will you state, briefly but fully, your qualifications as a naval architect and marine engineer?

A. I commenced an apprenticeship in shipbuilding in 1895, at the Palmer Shipbuilding Company, Jarrow-on-Tyne, England. That apprenticeship extended for five years during which I went through the various departments of the shipyards, and also in the drafting-rooms. During that time I attended, under the terms of my apprenticeship, the Armstrong College at Newcastle and the Institute—Mechanics' Institute—at Jarrow-on-Tyne. At the completion of my apprenticeship I then went into the drafting room of the Thames Iron Works, London, England, and later [fol. 73] on with the Vickers Ltd., in the north of England. In 1900 I was invited by Mr. Morse, who was then building the New York Shipbuilding Company at Camden, New Jersey, to come to this country as the assistant naval architect. I arrived here early in 1900, and I have been here since. On the death of Mr. Morse, in 1903, I then left and went as assistant superintendent of the Townsend & Downey Shipbuilding Company in New York, which you will remember is the yard where the Kaiser's yacht "Meteor" was built, and stayed there until they closed down, through financial difficulties, after which I went with the Fore River Shipbuilding Company at Quincy, Mass., first as assistant naval architect, and later I was the chief naval architect, and stayed there until 1917. I was in that yard about eleven years.

Q. 7. What vessels were built at that yard? What class of vessels?

A. Why, every type of vessel, from a steam trawler to a battleship.

Mr. Duncan: To a what?

A. From a steam trawler—a fishing boat—to a battleship.

Q. 9. Battleship?

A. Oh, yes. We built every type there. In 1917 I was invited by Irving T. Bush and his associates to go to Newberg, New York, and build a shipyard, and later build ships, under the War Emergency. I went to Newberg and we built the yard and we built sixteen ships during the five years I was there; and then, due to the slump in shipbuilding, and the keen competition, the yard closed down

and I then started in business for myself in New York City.

Q. 10. As what?

A. As consulting architect and engineer. As consulting naval architect and engineer.

Q. 11. Are you at the present time on any maritime committee or committees relating to maritime matters?

A. I am.

Q. 12. Just tell what those are, please?

A. I am chairman of the Technical Committee of the American Steamship Owners Association, which is an association of ship-owners comprising some forty to forty-two firms, located on the Atlantic and Pacific seaboards. I am a member of the Technical Committee of the American Bureau of Shipping, which is the American Classification [fol. 74] society. I am a member of the Special Committee on Stability for new passenger vessels, which is sponsored by the United States Department of Commerce for developing rules and regulations that will govern the minimum stability that new passenger vessels shall have. I am a member of the Special Committee, also sponsored by the Department of Commerce, of the United States Board of Marine Fire Underwriters, for getting up rules and regulations governing the requirements on shipboard for fire detecting and alarm. Let's see, if I am any more. Well, I think that is enough now.

Q. 13. And during your experience have you designed cargo vessels?

A. Many, sir.

Q. 14. And what is your particular branch at the present time, in your private practice?

A. Why, it is somewhat varied. I design and prepare plans and specifications for new construction. I prepare plans and specifications for the conversion of ships, and the repairs of ships.

Q. 15. Have you any particular line, or any particular duties, that take up the question of the stability of ships?

A. Yes. At the present time I am engaged—outside of my duties as a member of the Special Committee on Stability—I am engaged on a number of cases, as an expert, in which the question of the ship's stability is a point at issue.

Q. 16. That is, cases now pending in the various courts?

A. Well, some have been passed on by the Courts, and some have yet to come to the Courts.

Q. 17. Now, tell us—I think the witness is now qualified to tell us about ship construction?

The Court: To make the record clean: If you, Mr. Duncan, want to cross-examine the witness, you may do so, on that point. Now, or later. Just as you choose.

Mr. Duncan: I don't believe I will now, Your Honor.

The Court: Very well. Proceed.

Q. 18. Is there any fundamental rule in the designing of cargo ships with relation to the ratio of the beam to the length of the ship?

A. Yes.

[fol. 75] Q. 19. Is that the same on vessels designed to carry deckloads as it is for vessels used wholly for underdeck cargoes?

A. No, sir. When we know that a vessel has to carry a deck cargo, there are certain fundamental changes made in the design. For instance, while I was with the Fore River Shipbuilding Company, we built a couple of vessels for Pacific owners—the Atlantic and Pacific: those vessels were designed to carry a general cargo from Boston to the Pacific coast and bring lumber back from the Pacific coast to the Atlantic seaboard. The question came up as to whether we should increase the beam of the vessels to take care of the deck-load they were going to carry back, or make some other arrangements whereby we could take care of the effect of the deck-load. It was finally decided that, inasmuch a- the vessel was going to carry general cargo one way, with no deckload, that we would increase the depth of the double bottom. So the Atlantic and Pacific were given an unu al amount of water ballast capacity in the double bottom as a corrective against the center of gravity that the lumber cargo would have on the return trip.

Q. 20. Are you familiar with the dimensions and general construction of the steamship Nidarholm?

A. I am.

Q. 21. Can you tell the Court whether or not the Nidarholm—talking always, of course, about the time in question here—

The Court: Has he given the time in question?

Q. 22. Have you read all the testimony given in this case? The testimony of the master and the mate and Mr. McKnight and Mr. Macauley and the others, already taken in this case?

A. Yes, sir.

Q. 23. You have read that carefully?

A. Yes, sir.

Q. 24. Now, having in mind—

The Court: Does he say he has seen the ship, itself?

A. No, sir. I have not seen the ship.

Q. 25. From what source did you get the dimensions of the steamship Nidarholm?

A. The dimensions are shown in the record of the Norwegian Classification Society, under whose regulations the vessel was constructed. A copy of that register is in New York City.

[fol. 76] Q. 26. You have examined that?

A. I have.

Q. 27. Did you also get information as to the length, breadth, etc., from the captain's testimony in the record?

A. Yes. I confirmed what I received from the Register, which I think no one will question, by the testimony of the dimensions of the vessel, which appears in the testimony of the captain and others. And I also obtained what was reported to be a plan of the general arrangement of the vessel, through the ship-brokers.

Q. 28. Now, to get back to the question which I asked you. Was the Nidarholm designed—that is the construction and ratio of breadth to the length—to be fitted to carry a deck cargo?

A. No, sir. She was not. By answering that way I don't mean that she couldn't carry a deck load, for any vessel can carry a deckload within certain limits. But the Nidarholm, from her proportion of breadth to the length and from breadth to depth, wasn't designed as a vessel intended to carry deck-loads as a regular thing.

Q. 29. But, as I understand you, she is fit to carry a reasonable deck-load?

A. Yes, sir.

Q. Depending on—

A. Depending on the height of the deck load. And, naturally, its weight.

Q. 31. And, I suppose, also the voyage that the vessel has to go on has something to do with it?

A. Yes. That has a very material bearing on it.

Q. 32. Would the height of deckload and the amount of cargo the Nidarholm could safely carry vary from the winter time to summer time?

A. Yes, sir.

Q. 33. At which time of the year could she carry the larger deckload?

A. During the summer months.

Q. 34. Are you familiar with the draft and freeboard of the Nidarholm?

A. I am.

Q. 35. And what are they?

A. The classification society's register gives the freeboard of the Nidarholm as four fet and four inches. It also gives the molded depth of the Nidarholm as twenty-four feet five inches. Four feet four inches taken from twenty-four feet five inches gives you twenty feet one inch; [fol. 77] to which we have to add the thickness of the keel which was one inch. So that the mean summer draft of the Nidarholm will be twenty feet two inches. The winter draft will be probably four and a half inches less than that.

The Court: The winter draft?

A. The winter draft. Under the freeboard regulations, sir, during the winter months, a ship cannot load as deeply as she can during the summer months. The experience on which these regulations are founded demands that a vessel shall have a higher freeboard during the winter months than she has during the summer months.

Q. 36. Assuming that the Nidarholm at the time of the loss in question was drawing nineteen feet and four inches forward and twenty-one feet five inches aft, I will ask you whether or not that ship was overloaded?

A. Well, what was the mean draft?

(Witness figures on paper.)

The Court: What time of the year was she lost?

Mr. Thompson: In July, 1927.

A. That would give a mean draft to the bottom of the keel of twenty feet four and a half inches. The legal free-

board draft given by the ship's register is twenty feet two inches, which shows that the vessel had a mean overdraft of two and a half inches.

Q. 37. Now, I will ask you whether an overdraft of that amount would materially affect the vessel's stability, in your opinion?

A. Yes. It would. As a matter of fact, that freeboard regulation—those regulations—which are now practically universal in extent—quote the freeboards given as the absolute minimum for safety.

Mr. Duncan: I would like to know what he is talking about. What freeboard regulations, or requirements?

A. Well, practically every marine nation in the world, outside of the United States, has enacted into law free-board regulations which govern the minimum amount of freeboard and the maximum amount of draft that any vessel shall have, either during the winter months or the summer months, or whether she is sailing in the north Atlantic or middle Atlantic. As a matter of fact, during my quali- [fol. 78] fication, I forgot to tell you that the American Steamship Owners Organization, or Association rather, attach so much importance to this question of freeboard and draft that they have, themselves, formed a Special Committee of which I am a member, and we have circularized all the steamship owners on the Pacific and Atlantic coasts and they are practically unanimous in that the Department of Commerce shall appoint a Special Committee——

Mr Duncan: Now, may it please the Court——

Q. 38. Well, never mind that. Let me ask you——

A. Let me finish, please. —shall appoint a Special Committee to enact or recommend laws regarding freeboard requirements.

Q. 39. Will you please tell the Court just — it is that affects the stability of a ship? What causes a ship to become unstable?

A. The height of the center of gravity of the cargo. And the ship, combined. If the height of the center of gravity of the cargo and ship combined is above its transverse pivoting point, the ship is unstable.

Q. 40. I wonder if you would come up here to the bench and show the Court just what you mean by that; trying not to be too technical, so that we may all understand you.

(Witness goes to bench.)

Q. 40 (Continued): Will you now show the Court, by that sketch there, just where the center of gravity is on that plan—just where it would be—assuming first the vessel without any deckload?

A. The ship under consideration has no deckload. Its cargo is entirely within the holds below the upper or weather deck. The center of gravity of the cargo and ship combined will come approximately at the point that I have marked "G." On Bennett's Exhibit Number 1, for Identification.

(Bennett's Exhibit 1 for Identification marked.)

A. (Continued): The pivoting point of the vessel is approximately at a point marked "M". Merely for information—the two points marked "B" and "B-1" is the center of buoyance. "B" being the center of buoyancy in its new location when the vessel is inclined, as shown on the blue print "Bennett's 1." When the point "G" is below the [fol. 79] point "M," the point "M" has an upward force which is acting through the point "B-1," and the point "G" has a downward force which is acting through the point "G," which gives a righting couple which tends to bring the vessel back to an upright position.

Q. 41. Assuming that on this Bennett's 1 you put a deckload as represented by the blue pencil marks shown on the plan. What effect would that have on the center of gravity of that vessel? Assuming that the hold is filled with pulpwood and the deck cargo is also pulpwood?

Mr. Duncan: Wouldn't you better have all the elements in the hypothetical question?

The Court: Yes. Ask him again, and put it all in.

Q. 42. Assuming Bennett's 2 is a sketch of the whole of the Nidarholm showing the deck cargo of pulpwood approximately seventeen feet above the deck and with the holds of the same ship filled with a similar cargo, would this deck-cargo change the center of gravity of that vessel?

A. Yes.

Q. 43. And why?

A. In this case, due to the high deck-load, the mean center of gravity of the cargo in the hold, the deck-load of lumber or pulpwood and the ship itself, the center of gravity rises to approximately the location of the upper deck at a point I have marked "G." Provided the draft of the ship does not change, the position of the point "M" does not change. It has no control by the weight of cargo in any way. Therefore, when the point "G" moves above the point "M" the upward force through "M" and "B," and the downward force acting through "G," where "G" is above "M," sets up an upsetting couple, which has a tendency to further upset the vessel, or further list the vessel. That list, or inclining, will continue until the width of the waterline so increases that it forms a base sufficient to bring the vessel to rest.

Q. 44. Can you put that answer, Mr. Bennett, in a more commonplace way——

The Court: Less technical.

[fol. 80] Q. 45. Yes, in a less technical way; simply showing to us how the center of gravity would change; how it would act with different parts of the ship and cargo, and what effect that would have towards righting or tipping the vessel?

A. It is hard not to be technical.

Q. 46. As the cargo is piled on to the deck, I suppose the tendency is——

Mr. Duncan: I don't think you will have to lead him. He knows his stuff.

The Court: Yes. You must be careful.

A. I see what you mean. Why, the location of the center of gravity is really the controlling feature in the stability of a vessel, and that is why in my earlier testimony I stated in answer to a question that in the design of all vessels there were certain restrictions of beam to length and breadth to depth; and that this somewhat varied in the case of a vessel that we knew was going to carry a deck cargo. Those restrictions in dimensions are all determined by the prob-

ably center of gravity—or the possible center of gravity—of a vessel having a homogeneous cargo.

Mr. Duncan: May I inquire whether those restrictions are merely restrictions which you in your opinion regard as necessary?

A. No, sir.

Mr. Duncan: Then what is the standard of those restrictions?

A. What do you mean?

Mr. Duncan: You state that there are certain restrictions?

A. Yes, sir.

Mr. Duncan: What are those restrictions?

A. Why in the ordinary type of a cargo vessel——

Mr. Duncan: I hope you don't mind my asking these questions and interrupting you at this time, Mr. Thompson.

Mr. Thompson: Not at all. Go ahead.

Mr. Duncan (to witness): You have in your mind some standard—it is apparent as you testify—you say you have got to do thus and so. Now, is that your opinion as a naval architect. That standard you have in your mind?

A. It is the whole training of every naval architect in the world. It is the result of experience extending from the time of the Ark——

[fol. 81] The Court: You haven't registered the Ark?

The Bible gives us the dimensions of the Ark, and she was a very stable vessel. But to continue the answer: the position of the center of gravity is, of course, the controlling factor in stability. And the weightier the deckload or the higher the deckload, the tendency is, of course, to lift the center of gravity, and when you lift that center of gravity above the pivoting point then the vessel is unstable; and the greater the lift above that point is, the more unstable she is.

Q. 47. Now, let's get down to the facts in this case. Assuming the steamship Nidarholm, while loading a cargo of pulpwood at Murray, and after her deck load was approximately on she had a list of about five degrees to starboard, which was toward the dock at which she was loading; assuming that while this vessel had this list some of the pulp-

wood was transferred from the starboard side to the port side which caused the vessel to righten up to some extent at least; that immediately following this, aproximately fifteen additional cords of pulpwood was placed on this vessel, which caused the vessel to almost imemdiately take a list back to starboard; what in your opinion—whether or not in your opinion—whether or not in your opinion this vessel was stable?

Mr. Duncan: I object to the question in that form. I don't see how this witness can answer that question without knowing the weight of this cargo.

Mr. Thompson: He is simply drawing conclusions from the actions of the vessel itself, regardless of weight.

Mr. Duncan: You say fifteen cords of pulpwood put on. We don't know where it was put on, or, how much it weighed. We don't know what the deck cargo weighed. There are so many things that enter into a question like that.

The Court: Well, I will allow him— I should think it affected the probative value of the testimony. He may answer, and then whatever objection you have to make you may state. He may answer.

[fol. 82] A. Knowledge of the weight in that case is something that has practically nothing to do with the subject. It is the action of the vessel itself which is an indication of whether she is stable or unstable. Where a vessel, having part of a deckload on, takes on a list, and then, by moving part of that deckload to the other side, more or less straightens up, it indicates clearly that she is nearing the position of what we call neutral equilibrium. That is, that the point "G" and the point "M" are practically in the same location.

Q. 48. And where is the center of gravity?

A. It is immaterial. Immaterial. Now if, when you put additional cargo on, the vessel takes a new list, that indicates then a tendency that "G" is going above "M."

Q. 49. Now, assuming the facts stated in the previous question, and adding to that the fact that after this 15 cords of pulpwood had been placed on, this vessel took a starboard list and then while she was still in that starboard list with fifteen additional cords of pulpwood on, a

large portion of it was trimmeed over on to the port side and still the vessel maintained the starboard list. *What* that indicate anything to you as to the stability of the vessel?

A. Yes. It would indicate that she was quite unstable. And having a list as great as five degrees, putting that additional wood on to the high side, frankly, would have little or no effect in straightening her out, for the simple reason that the ship is on an incline and the center of gravity of the combined cargo and ship is so high that the righting effect of the additional lumber added on the high side would practically coincide with her original center of gravity, so that it has no effect other than to push the ship deeper into the water.

(Bennett's 3 marked, for identification.)

Q. 50. Referring to Bennett's 3, which is a blue print showing a representation of the steamship Nidarholm with a deck cargo and with an extra amount of deckload trimmed over to the port side of the vessel, with the vessel still on a starboard list, will you point out what righting effect the additional cargo on the port side has? You [fol. 83] understand, the vessel is listed over to starboard. The testimony shows that they trimmed this cargo over here to port; and perhaps Your Honor remembers that one or more of the witnesses said that even then that didn't bring the vessel up on an even keel. Now, I am asking the witness what righting effect it had?

A. Practically little. If we leave off the part which is named "Extra load on port side," the center of gravity of the combined ship and cargo would be on the center line or axis of the ship at a point I am marking with a pencil "G-1." The addition of the amount named "Extra load on port side" would move the center of gravity to practically the point "G," which I have indicated in yellow. Now the upward force of buoyancy acting through "B-1" and "M" and the downward force acting through "G" practically coincide, so that there is no righting arm or righting moment.

Q. 51. Can you draw two lines from that original load showing where that pressure would occur?

(Bennett's Exhibit 4 for identification marked.)

Q. 52. Referring to Bennett's 4, what does this line marked "weight" represent?

A. This line marked "Weight," towards the side of the ship, is the downward force only of the extra load on the port side.

Mr. Duncan: Does that push the side down or does it push the ship deeper into the water?

A. Of course, the real conditions are more as shown on Bennett's 3. You must, of course, take into account the whole cargo. But Bennett's four merely illustrates the force of the extra load, independent of any accounting for any other load.

The Court: Which, you claim, is to force the ship further down into the water?

A. No, sir. Bennett's 4 merely illustrates the effect of the downward force.

Mr. Thompson: Well, he wants to know the effect.

A. To push the ship deeper into the water.

The Court: That is just what I asked you.

(fol. 84) Q. 53. Assuming this same ship after she has received this deck load on at Murray, and after the deckload has been completed and the vessel is ready to sail, after her lines are let go, she still has a starboard list of approximately five degrees; that with the rudder amidships she backs around, backing away from the dock to make the turn in the harbor, and during that manœuver this ship changes from this starboard list of approximately five degrees and comes up on an even keel several times during that backing motion, without a change of the rudder; what, if anything, would that indicate to you as to the stability of the vessel?

A. There is no question at all in my mind but that that wobbling effect indicates instability.

Q. 54. Now, continuing on with the same facts, assuming that after that vessel has backed around where she had got to a place where she can come ahead on her course to sea, when she does come ahead this starboard list shifts over to a port list as the vessel comes ahead; what, if anything,

would that indicate to you as to the stability of that vessel at that time?

A. That would be additional confirmation of her instability. Earlier in my testimony—I think it was in connection with the exhibits Bennett's 1 and 2—I stated that the upsetting effect when the point "G" was above point "M" continued until the width of the water line increased and formed a base sufficiently wide to bring the ship to rest and to give the ship stability. Now, when a vessel starts out with a five degree list, or any degree, or any port list for that matter, and then flops over and picks up another degree list on the other side, it indicates an arc of roll there of instability. In other words, the vessel lists to one side until her water line breadth increases and she comes to rest; and then, due to some action of rudder or wind or waves, she will go over the other way sufficiently far to increase her water line until she comes to rest. But between those two points of swing, the vessel is unstable.

Q. 55. Getting back to Bennett's 3 and 4, in which you have explained the fact the effect of putting the cargo on the port side for the purpose of taking away a starboard [fol. 85] list; assuming that there has been some additional cargo put on the port side for the purpose of overcoming this starboard list, and that subsequently the vessel changes again from a starboard list to a port list; will you explain what effect that additional cargo on the port side will have on that port list?

A. When a vessel takes a starboard list with additional cargo which when the vessel was in a starboard list had practically no righting effect, adds considerably to the upsetting effect when the vessel goes over to port.

(Bennett's Exhibit 5 marked.)

Q. 56. Now, referring to Bennett's 5, for identification, does that indicate the pressure brought by that additional cargo on the port side, with the port list?

A. Yes, sir.

Q. 57. Now, continuing on that same voyage, Mr. Bennett, and assuming that as this vessel proceeded down—and I am always assuming that the sea is smooth or moderate—and that as the changes of the rudder are made the vessel's list increases—is affected by the change of the

wheel—what, if anything, would that indicate to you as to the stability of that ship?

A. It would be an indication to me of instability.

Q. 58. And just why?

A. Why, the vessel is attempting to come to rest in what we might call an unnatural position.

Q. 59. Right on that point: the Captain testified that a vessel with a five-degree list is more stable than a vessel on an even keel. What do you think of that?

A. Well, I think it is all nonsense. A Captain who would make that kind of a statement—a statement like that—well, it is hard to believe he would do it. Of course, if that was a fact, the question is, why don't we design vessels that way?

Q. 60. Well, I don't know. But is it a fact? A. Why, no, sir. It is not. It isn't a fact. It is pure tommyrot.

Q. 61. And now—

The Court: Has the Captain testified?

Mr. Thompson: Yes, sir. Both the Captain and Mate.

The Court: Testified in a deposition?

Mr. Duncan: Yes, sir.

[fol. 86] Mr. Thompson: On page 16 the Captain testified——

The Court: Well, no matter. He hasn't been before me?

Mr. Duncan: Unfortunately you have not been able to hear the Captain.

Mr. Thompson: The Captain said that a ship is more steady with a five degree list than when she is straight.

Q. 62. Do you know what degree of list the Nidarholm could take during the time in question here, on a summer freeboard, before she reaches her maximum degree of stability?

Mr. Duncan: I am perfectly willing to let that stand, subject to the same objection I made before. I don't think it is a proper hypothetical question. I don't think the facts are sufficiently assumed. If your Honor wants to let it stand as to the credibility——

The Court: Simply on what its probative value may be. But let me say, if you can suggest any reframing of the

question which will make it of a greater probative value, I suggest that you do it.

Mr. Duncan: Then I suggest that the question be reframed——

Mr. Thompson: Well, strike it out.

The Court: Yes, strike it out. I think I have in mind what the Captain meant. I don't know. I wonder if he has the same idea of what stability is, as the witness here. Well, no matter.

Q. 62. Do you know what degree of list the Nidarholm can take before she reaches her maximum stability on a summer freeboard?

A. I do.

Q. 63. Will you tell us how you know it?

A. The maximum righting arm for stability occurs when the edge of the deck reaches the water. Not only in the Nidarholm, but in every ship. With or without cargo.

Q. 64. Cargo has nothing to do with it?

A. What, sir?

Q. 65. Cargo has nothing to do with it?

A. No. It is the form of the ship which controls it. Now, as long as the vessel has the side of the ship above water she can keel and her righting arm increases. When the edge of the weather-deck touches the water line, she has [fol. 87] reached her maximum; and as she goes further over than that her righting moments decrease until they come to zero. Now, that is quite understandable, because one of the factors in stability is the width of the water line.

The Court: What?

A. The width of the water plane. Now you can quite see that as a ship keels over the water plane increases in width, the diagonal line——

The Court: Yes. I see.

(Witness indicates to Court.)

A. Now, when the edge of the deck starts to go under water, the width of that water plane decreases. Do you see?

The Court: Yes. I see. The angle becomes more acute.

A. Yes. And the stability decreases. The City of Paris, which was a well-known passenger ship——

Mr. Thompson: Well, that isn't admissible.

The Court: Well, if nobody objects——

Mr. Duncan: I don't object. I would like to hear about the City of Paris.

Mr. Thompson: All right, then; go ahead.

A. (Continued): The City of Paris comes into New York harbor practically every trip with a slight list; due to the fact that she has some twenty-odd feet of freeboard, that list is perfectly safe. If she had only two feet of freeboard it would be terribly unsafe.

Q. 66. You haven't answered my question as to what is the angle—the maximum degree of list—that the Nidarholm can take with safety?

Mr. Duncan: Now, I understand that the witness will answer that question without regard to cargo?

Mr. Thompson: Yes.

A. Yes. Cargo has nothing to do with it. It is the form of the ship; and it is based on the amount of freeboard that the vessel has. The Nidarholm has a summer freeboard of four feet four inches, and on her summer freeboard she can heel to 11¼ degrees.

[fol. 88] Q. 67. And if she lists more than that what is the effect?

A. She gradually gets into a more dangerous state of stability. A more upset state. For the reason that after 11¼ degrees, the water is running on the deck.

Q. 68. Now, assuming that the vessel was loaded below her summer freeboard. Would it increase or decrease the angle of stability?

A. Decrease it.

Q. 69. Take the facts in this case; that the Nidarholm was loaded so that she was drawing twenty-one feet five inches aft and nineteen feet four inches forward—which you have testified to—what would be her angle of stability?

A. Probably—I haven't figured it out—but probably it would be about ten degrees.

Q. 70. Ten degrees?

A. Yes, sir.

Q. 71. That is, it has decreased from eleven down to ten on account of this increased draft?

A. Yes.

Q. 72. Now, getting back to our voyage down; assuming, Mr. Bennett, that as the vessel proceeded down, as we have heard described, with the port list, that port list materially increased? What would that indicate to you as to the vessel's stability at that time?

A. If it materially increased it would indicate to me that there was some loose water in the vessel somewhere or a shifting either of the cargo or the bunker coal.

Q. 72. Are you also a marine engineer?

A. I am.

Q. 73. Do you know the amount of water the steamship Nidarholm consumes on a voyage similar to the one in question?

A. Approximately seven to eight tons a day.

Q. 74. And where is that water stowed?

A. In the double bottom compartments.

Q. 75. In the bottom of the ship?

A. In the bottom of the ship. Yes, sir. Probably below the boiler room.

Q. 76. Do you know the amount of coal that the ship would consume under the conditions in question?

A. At sea she would probably consume twenty-five tons a day.

Q. 77. And where does that coal come from?

A. From the side and transverse coal-bunkers.

[fol. 89] Q. 78. What effect on the stability of a ship, if any, would the use of this water and coal have?

A. It would make the vessel less stable.

Q. 79. A vessel is in its maximum condition of stability when it starts out on a voyage, for at that time she has the maximum amount of fuel for her boilers and the maximum amount of feed water for her boilers, both of which are consumable as the voyage proceeds. The boiler feed water is located in the lowest part of the vessel; therefore it acts as a righting-arm to the center of gravity of the cargo. The fuel, whether it is coal or oil, is also located low down in the vessel. Therefore it also has a righting-movement, as against the center of gravity of the cargo. Now, when you start to consume both the reserve feed water and fuel, you are taking away from the balance weight, as you may call them, as helping to keep the ship upright, and therefore

as the voyage proceeds the ship gets into a less stable position or condition.

Q. 80. What effect does the emptying of the water tank have on the stability of a vessel that is already listing? Assuming the water tanks are in the position they were at the time on the steamship Nidarholm?

The Court: At the bottom of the ship.

A. When you use water out of a tank which at the beginning was filled, or, as we call it, pressed up, you set up a condition of what we call free surface.

The Court: Call it what?

A. Free surface. It means that the tank not being entirely filled has a moving center of gravity; therefore if the ship has a list naturally the water, trying to find the lowest part, moves outboard; the center of gravity of that water moves outboard, and increases the upsetting moment. This question of free surface, or probably we should call it free liquids, has been deemed so important by the Safety Committee on Stability——

Mr. Duncan: I object.

A. (Continued): —of which I am a member.

[fol. 90] The Court: One moment. This is all expert. If you mean in your opinion—as well as these other men?

A. Yes, sir.

The Court: That is what your objection is?

Mr. Duncan: Yes. I am not interested in that Committee.

The Court: You may add there "and in my opinion, too."

The Witness: How far did I get?

(Reporter reads pending question and answer up to point of interruption.)

A. (Continued): —of which I am a member—and also in my opinion—that in determining the minimum stability for any new passenger ship that minimum has to take into consideration a certain amount of tanks having loose liquids;

a certain proportion of tanks would be better; having loose liquids.

Q. 81. Now, Mr. Bennett, assuming that this same ship has proceeded down the harbor, and as she proceeded down the harbor the list increased until it got somewhere around ten degrees, or slightly over, whether or not having a port list of ten degrees and all other conditions being the same as you have heard, and read, whether or not you should consider the steamship Nidarholm in that condition a seaworthy vessel to proceed to Portland, Maine?

A. In my opinion she certainly was not a seaworthy vessel.

Q. 82. And will you please tell us why not?

A. If the vessel starts out at the beginning of her voyage with a ten degree or more list, and that list is going to increase as it must in the course of consumption of feed water and fuel; coupled with the fact that the maximum righting arm of that vessel is reached at the draft stated in the testimony, when she was inclined about ten degrees; that she would probably meet with beam winds, the waves and the way; in my opinion she was in no condition to start out upon even a short trip.

The Court: Have you got the libel there?

Mr. Thompson: Yes, Your Honor.

(Hands libel to the Court.)

[fol. 91] Q. 83. Have you read the testimony of the different witnesses already taken in this case, as to the method of placing and securing the stanchions?

A. I have.

Q. 84. Now, assuming that as the vessel proceeded down, and while listing to port, a part of her cargo went overboard, and that then she went back to starboard and then to port several times until the deckload was cleaned off up to the rail, and she then proceeded back to Murray where an examination of the damage showed that the butts of some of the stanchions were pushed away from the rail of the vessel into the cargo; that some of the stanchions were broken off at the rail and some of them below the wire lashings; that some of the rivets in the rail of the vessel had been started and the rail itself showed signs of strain;

what, if anything, would that indicate to you as to the strength of the stanchions?

Mr. Duncan: I object. The witness has not qualified as an expert on loading pulpwood. He has qualified as an expert on many things, but not as an expert on loading pulpwood.

Mr. Thompson: He is an expert and testifying as to his conclusions drawn from certain facts assumed.

Mr. Duncan: And you have nothing in your question, as I recall it, as to the strength of the stanchions, the strength of the lashings——

Mr. Thompson: Well, that is what his opinion is going to be based upon. The strength of those things. Drawn from the facts that he found, the butts of the stanchions pushed into the cargo; some of the stanchions broken off at the rail and below the lashings; and that the rail itself had been pushed out. Now, I ask him what, if anything, that indicates to him as to the strength of those stanchions.

Mr. Duncan: And I object on the ground that the witness hasn't qualified to answer that question.

The Court: Well, my opinion is—strike that out: Here must be, I think, a question as to the value of his testimony—the probative value. You may cross-examine him if you desire right on that point; as to what he knows on that [fol. 92] subject. And with that in mind, I will admit the question.

Mr. Duncan: Well, Your Honor, isn't it necessary for Mr. Thompson, before he asks the question, to show his qualification, rather than leave it to questions on cross-examination?

Mr. Thompson: I should think that if ever a man was qualified he was.

The Court: As I have stated, I should think he showed enough qualification to give some value to his testimony—to make it admissible—with the understanding that you may cross-examine, as to his knowledge touching that subject; and it may be that you can show that it was of little or even of no value. But, with that in mind, I will allow him to answer the question.

A. The testimony, as I recall it, states that these stanchions were from twenty to twenty-two feet long, and

were lashing alongside the steel bul/wark of the ship, at the top of the rail and also lashed at the foot; and that some twelve feet above the deck there was a steel wire guy-wire or guy-rope which was secured to the stanchion at one end and then led diagonally downward and secured to ring-bolts along the hatch coaming. There were other particulars of the construction of this bul/wark which is hardly necessary to include in answering the question. The fact that the butts of these stanchions were found pressed into the cargo, and that the rail of the ship was damaged, clearly indicates that to start out with there must have been a severe side-pressure against the stanchions. Before the bottom of the stanchion can move inboard the top of the stanchion must move outboard, pivoting at the rail of the bul/wark. However, before the top of the stanchion can move outboard something must have happened to the diagonal steel wire guy. Steel wire practically does not stretch. Therefore, the steel wire must have either broken or otherwise come adrift. After the wire came adrift we simply have a problem of a stanchion which is held at the bottom. The only support that those stanchions had, after that wire gave way, was the force of the cargo at the extreme butt, and the support of the bulwark. The fact that the bulwark was dis-[fol. 93] torted clearly shows that the stanchions had considerable strength before they gave way.

Q. 85. Does that indicate anything to you as to whether the stanchions broke before the wire rope broke?

A. Yes. As I said before, the top of the stanchion would move outboard—something must have happened. Something must have happened to the wire rope before the top of the stanchions would move outboard. Wire rope doesn't stretch; therefore it must have either parted or come adrift.

(Bennett's Exhibit 6 for Identification marked.)

Q. 86. I ask you, Mr. Bennett, to tell us if you will what Bennett's 6 for Identification represents?

A. Bennett's 6 is a sketch drawn to scale, showing part of the deck—it is a transverse section—showing part of the deck, part of the cargo hatch, part of the ship's side, and part of the bulwark or rail above the deck. It also indicates the stanchion that has been mentioned in the testimony, the

diagonal steel wire guy or rope, which was secured to the stanchion some twelve feet above the deck and is led diagonally down to the side of the hatch coaming, and it also indicates the top of the seventeen foot deckload. In dotted lines I have indicated the stanchion as it moved under the force of the load of pulpwood on the side of the ship; the top of the stanchion moving outboard and the butt or bottom of the stanchion moving inboard, and pressing itself into the cargo, and hinging or pivoting on the top of the rail, on the edge of the bulwark rail. Now, it clearly shows that before the top of the stanchion can move outboard the wire rope guy will either have to stretch or it will have to part. Inasmuch as steel wire will not stretch, it must have parted. Now, the fact that after that rope parted there was sufficient strength still remaining in the stanchion that it could force the butt of the stanchion into the closely packed deckload and force the bulwark rail outboard, clearly indicates that those stanchions were of considerable strength.

Q. 87. Did you examine one of claimant's exhibits in this case which was a survey made by William Stewart?

A. Yes, sir.

[fol. 94] Q. 88. And what does that show as to the rails of that vessel?

A. It shows that the rail, which is the structural shape of the top of the bulwarks, and also that the riveted connection for about two or three riveted plates at the top of the bulwarks or rail for practically the full length of the rail between the forecastle and the bridge front and the after side of the bridge and the poop front—or in other words in the locations where the deck-load was carried—was badly distorted to such an extent that it was necessary to loosen the rail, straighten the plating, replace the straightened rail and replace the started rivets.

Q. 89. And is this where you got your information as to the damaged rail? This exhibit?

A. That and in the testimony itself. The captain, I believe, testifies as to the damage to the rail.

Q. 90. Mr. Bennett, Mr. McKnight, one of the witnesses in this case, testified that he asked the captain if he was going to put a lashing thwartship opposite the foremast on each side and around the foremast, for the purpose of supporting the stanchion directly opposite the foremast. Do you recall reading that testimony?

A. I do.

Q. 91. Whether or not, in your opinion, a lashing of that kind would have been desirable, or would have helped support the stanchion?

A. A lashing of that type is very desirable. In fact, that one lashing would have been able to exert more support to the stanchion it was connected to than any of the other lashings on the ship. For this reason; the lashings are indicated in the various Bennett's exhibits to run diagonally downward——

Q. 92. As shown in Bennett's 6?

A. Bennett's 6; and in Bennett's 1, 2, 3, 4 and 5, too. The lashing which was suggested by Mr. McKnight, which would have been attached to the mast, would undoubtedly have been attached to the mast above the mast-table; the mast-table is indicated in dotted lines on Bennett's Exhibit 5, for instance. There it is, sir. See?

Q. 93. Why don't you make it "T" for "table"?

A. I will mark the name "Mast table" on Bennett's Exhibit 5. That guy being almost horizontal, as against the other guys being diagonal, would exert a greater support-[fol. 95] ing pull to the stanchion to which it is connected. Let me illustrate that in some other way. When you are beginning to lift a pole off the ground, naturally if you stand right near the butt of the pole, the force which you exert has a tendency to pull the pole into the ground, and there is little force left to lift it up. The further you can get away from that pole, and the more horizontal you have that pull, the less pressure there is to pull it into the ground, and the more force to lift it. And it is the same in this case. Where the guy line was horizontal the whole of its strength was given to support, and none to downward force.

Q. 94. Now, the captain or mate testified that they didn't consider that lashing of any value, because they testified that the shrouds of the mast would support that cargo and take the place, to a large extent, of that lashing. Is that true?

A. No. That is rank nonsense.

Q. 95. And why, Mr. Bennett?

A. Well, the shrouds in the Nidarholm, as they do in all ships, start at the edge of the deck and run inboard until they meet the mast some twenty to thirty feet above the

deck. Naturally at a point seventeen feet above the deck it must be considerably inboard. They are run diagonally from the edge of the ship.

Q. 96. Is that shown quite clear on Bennett's 6?

A. Yes. Plainly. It is marked "Mast Shroud," and it starts at the intersection of the side of the ship and the upper deck, and runs diagonally upward and inboard until it reaches the mast.

Q. 97. Until it reaches the mast?

A. Yes.

The Court: What are the shrouds made of?

A. Steel wire. Therefore at a point practically seventeen feet above the deck the shroud is inboard from the rail about nine feet. Now, all the lumber—or the pulpwood, rather—which is outboard of that shroud, naturally can have no support from it.

Q. 98. Is there any other reason why the shroud would not support the pulpwood at that place?

A. Yes, sir. The Nidarholm has three shrouds per side only. And those shrouds have no ratlines. The ladder. [fol. 96] The ladder to get up the mast is secured to the mast itself. The three shrouds are placed approximately twelve feet apart, each; so that from the foremast shroud on the mast to the aftermast shroud is a space of twenty-four feet in which there is one shroud in between. Now the spacing of the shrouds at seventeen feet above the deck—or at the top of the deckload—are placed about seven foot six apart. Inasmuch as the pulpwood was cut into lengths of approximately two feet, it is readily seen that two shrouds—or three shrouds rather—each spaced seven feet and six inches apart from the other, can have no tendency to stop the movement of pieces of lumber two feet long.

(Recess at this point until 11:30 A. M.)

Cross-examination.

Mr. Duncan:

X Q. 1. What experience have you had at sea, Mr. Bennett?

A. I have been on board of coastwise— I have been on a number of coastwise trips, on various types of vessels.

X Q. 2. In what capacity?

A. As observer, and recently as a paid engineer.

X Q. 3. How recently was that?

A. It was trip on the Mercer from Baltimore to New York. The first pulverized coal-burning ship in the world. I came up to New York engineer and got one penny for the trip. We were not really a part of the crew, but we had to be signed on, and so we signed on and got a penny.

X Q. 4. Have you been to sea on ships with cargoes?

A. Yes. One of my clients has engaged me to observe each of their ships as they come to the Atlantic seaboard with lumber from the Pacific coast.

X Q. 5. And how many ships have you observed in that capacity?

A. Why, he has seven ships in his fleet; and I suppose I have seen each one four to five times.

X Q. 6. Were you concerned in the building of those ships?

A. No.

[fol. 97] X Q. 7. Where were they built?

A. In different parts of the world.

X Q. 8. Well, were they built according to what you consider to be the correct theory in building ships with deck cargoes?

A. They were built as ordinary freight ships. Ordinary cargo ships. But they carry a deck load of lumber on their return trip from the Pacific coast.

X Q. 9. Well, are they according to the ideals which you spoke about as being— The vessels you spoke of as being ideal?

A. They were not built as——

X Q. 10. No. You don't understand me. I mean were they built according to the specifications which you assumed to be ideal for a deck cargo carrying ship?

A. What do you mean by "the specifications"?

X Q. 11. Dimensions. You spoke in your direct examination about the Atlantic and Pacific?

A. Yes, sir.

X Q. 12. Which were built specifically for the purpose of carrying deckloads of lumber from the Pacific to the Atlantic coast?

A. That is right.

X Q. 13. Well, what I am getting at is are these ships which you have observed for your client built along the same lines as the Atlantic and Pacific?

A. They are. Yes, sir.

X Q. 14. Have you been to sea on any of those ships, or have you just observed them coming in?

A. I have observed them coming in. I have traveled from Philadelphia to New York with a deck cargo on, however.

X Q. 15. What ship was that?

A. The J. R. Gordon.

X Q. 16. Did she have any list at all?

A. She didn't.

X Q. 17. How high was the deck cargo?

A. Fourteen feet.

X Q. 18. Is she a well-deck ship?

A. Yes, sir.

X Q. 19. Is that the only ship with a deck cargo that you have ever travelled on?

A. No. I travelled on ships from New York to Newberg, up the Hudson River, about sixty miles, with deck loads.

X Q. 20. How many ships?

A. Three, I think.

[fol. 98] X Q. 21. In what capacity?

A. Observer.

X Q. 22. And do you remember how much of a deck load they had on? A. Yes, sir. On various trips they varied from fourteen to sixteen feet.

X Q. 23. Any of them have any less?

A. No.

X Q. 24. Now you have seen a great many ships with deck loads in the course of your long experience?

A. I have.

X Q. 25. Have you ever seen any of them with a list?

A. I have.

X Q. 26. How great a list have you seen them with?

A. Two or three degrees.

X Q. 27. Never more than two or three degrees?

A. No, sir.

X Q. 28. What proportion of the ships carrying deckload cargoes which would compare with the cargo of the Nidarholm, have had this list?

A. Sir, you cannot compare a lumber ship with the Nidarholm.

X Q. 29. Why not?

A. Because the Nidarholm in this particular case was starting out on a trip, and the vessels I am referring to were completing trips.

X Q. 30. Well, I didn't go into that. I asked you what proportion of them, as you saw them, had this list?

A. Probably five percent.

X Q. 31. Have you ever been on a ship with a deck cargo when she got in shallow water with not more than two feet between her keel and the bottom?

A. Not to my knowledge.

X Q. 32. Have you ever been on a ship with a deckload, and observed her action when the wheel was put hard one way or the other?

A. I have.

X Q. 33. And what was the effect, if any?

A. The effect depended on the stiffness of the ship.

X Q. 34. Will you explain that?

A. Yes, sir. The stiffness of the ship increases as the point "G"—the center of gravity—is below the point "M." When the ship is stiff she doesn't move to the action of the helm like a ship that is tender.

[fol. 99] X Q. 35. But, so far as you have observed, when the helm was put hard one way or the other, with a full deckload, did you observe any change in the ship as to the perpendicular? Did she go one way or the other?

A. Slightly.

X Q. 36. And which way would she go? Let us assume that you have a hard-a-port helm; that would carry your bow to starboard——

A. Say that again?

X Q. 37. I say, let's assume that you have a hard-a-port helm, which would carry your bow to starboard?

A. Yes, sir.

X Q. 38. And let's assume that the ship had a list to port; what would be the effect of that command; or the execution of that command?

A. She had a list to port? It would probably increase the list.

X Q. 39. Well, would you expect her to come back, after the command had been executed?

A. Yes.

X Q. 40. Now, where did you get your information with regard to the Nidarholm?? You have never seen her?

A. No.

X Q. 41. Where did you get your information in regard to the Nidarholm?

A. First, out of the classification registers of the Classification Society, under whose rules the vessel was built.

X Q. 42. What society is that?

A. The Norwegian Classification Society.

X Q. 43. What is the name of it?

A. Norwegian Veritas.

X Q. 44. Do they issue a book, like Lloyd's Register?

A. Yes, sir. Like Lloyd's.

X Q. 45. And you got all of your information out of that book?

A. No, sir.

X Q. 46. Where?

A. Then I corroborated it and supplemented it from the testimony that has already been taken.

X Q. 47. Any other source of information?

A. Yes. Later I also compared these two—you might say—with a print I got through the brokers, which was supposed to represent the Nidarholm.

X Q. 48. What brokers were they?

A. The brokers that were engaged by the Oxford Paper Company.

[fol. 100] X Q. 49. What name?

A. I forget the name. The plan came to me through the Oxford Paper Company. I asked them to supply it, and they got it through their brokers.

(Witness gets paper from table.)

Mr. Duncan: Do you know anything about this plan, Mr. Thompson?

(Counsel confer.)

(Plan marked Claimant's 2 for identification.)

X Q. 50. This is the plan upon which you have drawn your scale? These other plans, I mean?

A. No, sir.

X Q. 51. Where did you get the dimensions which enabled you to draw these?

A. Out of the Classification Society's Record.

X Q. 52. Have you checked those with the scale appearing on this plan?

A. No. That plan is not to scale. That is a photostatic copy; a photostat from a scale plan.

X Q. 53. I see. What do you mean when you say that a ship is tender? Do you understand the mean- of the phrase "tender" as applied to a ship?

A. I do.

X Q. 54. What does it mean?

A. That the vessel will heel very readily.

The Court: Tender, as an adjective?

Mr. Duncan: Yes, sir.

The Court: The ship is tender?

Mr. Duncan: Yes.

X Q. 55. And the effect of putting a deckload upon a ship is to make her more tender than she is without one, isn't it?

A. Yes, sir.

X Q. 56. Now, in those plans you have drawn, you have—this is Bennett's Exhibit 4 for identification; and I believe that that plan was drawn for the purpose of showing the effect of putting the extra load on the port side of the ship when the ship already had a list to starboard. Is that right?

A. That is right.

X Q. 57. And do I understand you to say that that has no effect toward righting the ship?

A. It hasn't.

[fol. 101] X Q. 58. And is would make no difference how much you put over there?

A. No, it wouldn't.

X Q. 59. Well, then, if a ship has a five degree list to starboard—the Nidarholm, under the conditions she was before she sailed and she has a five degree list to starboard, and we should get some lead ballast, say three hundred tons,

and put in along the starboard rail, it wouldn't affect the list?

A. It would. Certainly it would.

X Q. 60. Well, then, is it merely a question of degrees?

A. No. It is a question of the location of the center of gravity of that additional load. Your illustration of lead—lead is an ore which has great weight, and therefore three hundred tons represents a comparatively little volume. Therefore you can put that out right to the rail of the ship; push it right out to the rail of the ship. Pulpwood, on the other hand, has comparatively large volume for a similar weight. Therefore the center of gravity cannot be out to the rail.

X Q. 61. Well, you have that picture drawn of her; that is drawn just from your conception of the situation as shown by the testimony. How far in from the rail is the center of gravity of that load?

A. I have drawn this sketch in the worst possible condition I could conceive. Frankly, I think it was very much better than that. But I have pushed that outboard, and that load is as far outboard as possible, and the center of gravity there comes approximately five feet in from the inboard edge of the stanchions.

X Q. 62. And you say that would have absolutely no effect towards straightening the ship?

A. Yes. You will understand it better if you refer to my Exhibit Number Three. Because in considering that extra load that has been put outboard on the port side, you have to take it in connection with the whole load of the ship. Therefore, that small portion—that small proportion of weight, as compared with the total volume of the ship, moves the center of gravity outboard a very little distance. And you will find on my Exhibit Three that the center of gravity is practically running in the same plane as the upward force of buoyancy.

X Q. 63. Are you saying now that the placing of that ad-
[fol. 102] ditional load would move the center of gravity outboard a little bit? Is that what you mean by that answer.

A. A little bit.

X Q. 64. So that it *is* a question of degree?

A. It is a question of degree. Yes.

X Q. 65. And the only difference between lead and wood is the difference in weight, plus the fact that you can put your lead farther outboard?

A. That is right.

X Q. 66. If you could stick a pole over that outboard side, and hang a weight on the end of it, you would get even more effect?

A. Certainly.

X Q. 67. So, if you had a ship with a five degree list to starboard and you had to carry fifteen cords more of wood, the place to put it would be on the port side?

A. It would not.

X Q. 68. Where should it be put?

A. Well if the ship had a list when you were going to place that fifteen cords it should never have gone on. But, if it did go on, it should have been equally distributed.

X Q. 69. Even though putting it on the outboard side would have some effect towards reducing the list as it then existed?

A. It would have some effect, but it is so small that it is hardly noticeable.

X Q. 70. Then it didn't really make much difference at all, putting on that last fifteen to twenty cords?

A. Yes, it did.

X Q. 71. How did it?

A. It raised the center of gravity and made the ship less stable.

X Q. 72. Now, you say that this ship could go over only eleven and a quarter degrees safely?

A. No, sir. I said it would go over eleven and a quarter degrees when it reached its maximum righting arm.

X Q. 73. How far could it go over safely?

A. Thirty to forty degrees, perhaps.

X Q. 74. Would it have to go that far to withstand the ordinary perils of navigation?

A. It wouldn't.

X Q. 75. If a ship the size of the Nidarholm gets in a heavy sea, how far will she roll off the perpendicular?

[fol. 103] A. There are so many conditions governing that, I really can't answer. Heavy wind conditions, and synchronous rolling, and waves; all kinds of conditions.

X Q. 76. Well, if you are designing a ship that is to cross the ocean, isn't it necessary to design her so that she can roll at least thirty degrees safely?

A. Yes.

X Q. 77. Any more than thirty degrees?

A. Depending on her freeboard.

X Q. 78. What is freeboard?

A. Freeboard is the amount of the side of the ship which is above the water level.

X Q. 79. The amount of the side of the ship which is above the water-line?

A. Yes. The height of the side of the ship.

X Q. 80. And in a ship like the Nidarholm, where did you measure that?

A. At the midship point, which is half way between the stem and the stern.

X Q. 81. And what is the upper limit of your measurement?

A. The statuary deck line. The weather deck line. In the Nidarholm it was the upper deck.

X Q. 82. How much freeboard did you have on the Nidarholm?

A. Four feet and four inches is allowed by the register during the summer months.

The Court: That is, free board from the deck up; or from the water line up?

A. From the deck line; or, from the water line up.

X Q. 83. The distance between the deck and the water line?

A. Yes, sir. It really is based on the amount of reserved buoyancy that is required to make a ship safe.

X Q. 84. I understand you to say that the amount of freeboard governs the distance which the vessel may roll, before she reaches her maximum righting-arm?

A. Yes, sir.

X Q. 85. And I understand you to say that cargo has no effect upon that?

A. No, sir.

X Q. 86. What do you mean, "No, sir"? Is that right, or didn't I understand you?

A. That is right. It has no effect.

[fol. 104] X Q. 87. So that if you had a heavy ballast down in the bottom of the ship, she would still reach her maximum righting arm as if she had no ballast?

A. Provided she had the same freeboard she would.

X Q. 88. Provided she had the same freeboard?

A. Yes, sir.

X Q. 89. When you say she had four and a half feet freeboard, you are taking that from the draft which she had before she left the dock?

A. No, sir. That is the official record of freeboard. Four feet and four inches.

X Q. 90. Four feet and four inches?

A. Yes, sir.

The Court: Freeboard is from the deck down to the water line?

A. Yes, sir.

The Court: Does it make any difference how high the rail is?

A. No. The rail is merely a non-water-tight device to keep the cargo from falling overboard; or the crew, rather.

X Q. 91. So the Nidarholm has a freeboard that is fixed and set?

A. Yes, sir.

X Q. 92. And no matter what she may have in ballast, or how she may be loaded, the Nidarholm will always reach her maximum righting arm at the same point?

A. Provided she has the same freeboard. Yes.

X Q. 93. She always has the same freeboard?

A. No, sir. If she was loaded with feathers she would have a small draft and high freeboard.

X Q. 94. How is the official freeboard measured?

A. By the Classification Society, and it is marked on the side of the ship, generally with a round disc with a horizontal line through it. That is the minimum freeboard that a vessel should have to operate with safety. That freeboard is increased during the winter months. The Nidarholm—her increase—would probably be four and a half to five inches. It is increased further still if she operates in what we call the winter North Atlantic; and that is really determined by competent authorities—the amount of reserve of buoyancy, or the amount of the ship above water—[fol. 105] which is necessary for safe navigation.

X Q. 95. Now, what experience have you had, Mr. Bennett, with securing deck cargoes?

A. On what type of ships?

X Q. 96. Similar to the Nidarholm?

A. Not very much.

X Q. 97. Well, what experience have you had with securing deck cargoes on any ships?

A. A good bit.

X Q. 98. What; briefly?

A. Why, when you design a lumber schooner one of the things you have to take into account in the design is the method and means for securing that deck load of lumber. It is one of the things that I have to observe on the various lumber carrying steamers as they come to New York; as to whether the lashings are sufficient in number, whether they are properly placed, whether the side shores are sufficient in numbers and properly secured.

X Q. 99. What is the proper way of securing wire lashings to stanchions, in a case like the Niharholm?

A. Give them a twist around and seize them, either by a marlin or one of the regular seizing clamps.

X Q. 100. Well, assuming that they are knotted, there would be considerable give to them, wouldn't there?

A. No, sir. When a seaman knots a rope he always seizes the loose end. And if he doesn't do it, why, he is no seaman.

X Q. 101. Let's go back to the pushing in of the bottom of the stanchion into the cargo. The testimony on that is this; the captain said that one lashing on the port side forward was broken. The first mate said that none were broken——

The Court: What?

Mr. Thompson: I will have to correct you. The first mate says he doesn't recall whether there were or not. I have got the testimony right here.

Mr. Duncan: Well, I have it, too.

The Court: Well, is it very material anyhow? Just exactly what was said?

[fol. 106] Mr. Duncan: Well, perhaps not.

X Q. 102. Mr. McKnight testified that when the ship got back to port two of the lashings had gone. Mr. McKnight also testified that the stanchions on the port side forward—the bottom of them—were pushed into the cargo. Now, let's

assume that only one lashing broke. How would you explain the fact that the bottom of the other stanchions were pushed into the cargo? Or, we may assume that only two lashings broke, which I think is the best possible case for the Oxford Paper Company. How would it then be possible for the other stanchions to be pushed into the cargo?

A. If two lashings broke and the cargo started to move overboard, which the testimony shows it did, it would naturally relieve the amount of pressure that the other stanchions would have to exert to push them into the cargo. As long as the cargo was intact, the amount of pressure would be equally distributed along the deck. So that each stanchion—as a general principle—would have to push practically the same amount in order to force itself into the cargo the same distance. But immediately the cargo began to release itself, why, naturally the amount of the pressure would decrease, too.

X Q. 103. Would they be able to push themselves into the cargo while the lashings held?

A. I doubt it, very much. I can't see it, from an engineering point of view, at all.

X Q. 104. You said you had had no experience with a deck cargo in shallow water. Can you, as an expert, tell me what the effect is upon a ship going into shallow water?

A. Yes. We have a similar condition to that in designing vessels for the Erie barge canal. We find there that when a boat has very little water under her that her stern has a tendency to drop; and I think the same experience would apply with a ship going over shallow water. That is, that the stern will have a tendency to drop. If the ship has an incline, possibly it will increase the incline slightly. As the bilge being the lowest part of the ship. And what we call "smelling the bottom" or near the bottom, it would have a tendency to drop slightly.

[fol. 107] X Q. 105. In regard to these shrouds; which one were you talking about in giving Mr. Thompson the figures of seven and a half feet?

A. Either of them.

X Q. 106. Now when the cargo was lost the ship had a list the other way. Have you got one with a list to port?

A. Yes, sir. Exhibit 5.

X Q. 107. Referring to Bennett's Exhibit 5; are these mast shrouds drawn accurately on that plan?

A. Yes.

X Q. 108. How much of that deck cargo would be exerting pressure against the retainers on the port side? What proportion about?

A. I have indicated.

By Mr. Duncan: Witness indicates on this exhibit by dotted line in pencil marked "X," indicating that proportion of the deck cargo which would bear the stanchions on the port side.

A. Yes.

X Q. 109. And what proportion of that amount is outboard of the mast shrouds? About half of it, isn't it?

A. About half of it. Yes, sir.

X Q. 110. Do you say that those shrouds would give absolutely no support?

A. Absolutely no support at all.

X Q. 111. Even though the pulpwood was ranked against the shrouds as they came up?

A. Yes, sir.

X Q. 112. Now do you remember, Mr. Bennett, some testimony in the case with regard to the Nidarholm taking on some more coal before the trip on which the loss occurred?

A. No.

X Q. 113. It was testified that the Captain asked the Oxford Paper Company on the trip in which the loss occurred—he already having made one trip in this charter—for some additional coal, which he didn't need exactly but which would help him as ballast; and that was given him. Now the effect of putting that coal in the bottom of that ship would be to enable him to carry a greater deck load, wouldn't it?

A. It would. Yes, sir.

X Q. 114. And can you form any opinion——

A. Why, let me see. It would also increase the amount which he was overloaded.

[fol. 108] X Q. 115. That is, taking the whole ship?

A. Taking the whole ship. Yes.

X Q. 116. Well, is it your opinion that this ship was overloaded in—regard to the total weight she carried?

A. Yes. She was overloaded as regarding the total weight she carried.

X Q. 117. Not merely——

A. The distribution of the weight affects stability. The amount of the weight affects the freeboard and draft.

X Q. 118. In your opinion she had too much weight, and also it was distributed in an unstable way?

A. She had too much weight which made her overdraft, and therefore encroached on her legal freeboard; and her deck load was so high that it made her unstable.

X Q. 119. Now in regard to her stability—the stability of the ship—and your various assumptions relating thereto; what have you assumed as to the condition of her tanks?

A. I have assumed that her tanks were all filled.

X Q. 120. And with regard to her coal?

A. As a matter of fact, the condition of her tanks and coal didn't really enter into it. My claim that the vessel was unstable is based on the action of the vessel itself, at the dock, when she was leaving the dock, and as she proceeded down the harbor. The statement in the testimony to the effect that all the tanks were filled, merely shows me that she had no method at all in which she could overcome her instability. To illustrate: Certain lumber-carrying vessels that leave Gray's Harbor, on the Pacific coast, have to cross the bar. They are permitted to cross that bar with certain double bottom tanks not filled, in order to lighten them up to cross the bar with three or four degrees inclination, providing that immediately they cross the car they fill those tanks. Now, those empty tanks are what you may call reserve stability. That is, you add that weight to the bottom there, which counteracts the center of gravity of a lumber cargo. The testimony as to the Nidarholm is to the effect that all the tanks were filled. Therefore, she had no possible means at all of bettering her stability condition when she [fol. 109] left port, but the consumption of her feed water and of the coal was going to make worse conditions of stability as the voyage proceeded. Now, the amount of water and of coal had nothing to do with it at all, in coming to my opinion. It was the action of the ship itself.

X Q. 121. You speak of lumber cargoes on the west coast. They have inspectors over there, don't they, that go out on those deck-laden ships?

A. Yes, sir.

X Q. 122. And they decide whether or not they are stable enough to proceed?

A. Yes. And sometimes they decide wrong.

X Q. 123. And they do permit them to proceed with lists one way or the other, don't they?

A. They very seldom start out with a list. Very few lumber vessels start out with a list. Because if you start out with the list, the effect of that is that you have an uneven distribution of weight or you are in an unstable condition. And as the voyage proceeds you get more unstable; any list you start with is going to be increased. There are few vessels that start with a list, but a number of them—depending on the length of the voyage—will complete voyages with a list.

X Q. 124. Have you been on the west coast and observed the way that the inspectors handle things out there?

A. No, sir.

X Q. 125. What is point "M" here?

A. "M" is the meter center. In explaining it, it is practically the transverse pivoting point of the ship.

X Q. 126. How do you locate that particular point on that particular plan?

A. Point "M" is always located from the center of buoyancy to that point "B."

X Q. 127. Well, how did you locate "B"?

A. Our experience has shown that the center of buoyancy is slightly above half the draft of the ship.

X Q. 128. What do you call the draft of the ship?

A. From the bottom of the keel to the water line when she is on an even keel.

X Q. 129. With what load on?

A. No load at all.

X Q. 130. So you take the draft of the ship light?

A. Yes, or loaded. Whichever condition you want. Of course the center of buoyancy changes if the ship is deeply loaded, too.

[fol. 110] X Q. 131. You take her draft here according to the draft shown in the testimony?

A. No, sir. All these sketches are shown with the legal freeboard of four feet four inches.

X Q. 132. I see. What is the point "B"?

A. Point "B" is a little bit above half the draft of the ship.

X Q. 133. And how is point "M" fixed?

A. When the vessel inclines, as is illustrated on Bennett's Exhibit 1, naturally the center of buoyancy, which of course is the center of the immersed portion of the vessel, moves outboard, or towards the lower end of the ship; or the deep or submerged part of the ship.

X Q. 134. Yes?

A. All right. A vertical or perpendicular line that is perpendicular to the inclined water line through point which I have marked B-1, the mean center of buoyancy, where it crosses the center line of the ship, is the location of point "M" or meter center.

X Q. 135. How did you locate B-1?

A. B-1 is the center of the odd-shaped immersed portion of the ship when she is inclined, as shown on the exhibit.

X Q. 136. Will you now explain to me the difference between point "G" on "1" and on "2"? And the mechanical means you use to locate those on the plan?

A. On Exhibit 1 there is no cargo above the upper deck. All the cargo is assumed to be stowed below decks. And therefore the point "G" represents the center of gravity of the cargo and the ship. It is approximately located, and is taken as the center of the cubical contents of the hold and adjusted, as my experience as an able designer suggests, to compensate for the masts and funnels, and to further compensate for the lower weight of the double bottomed tanks.

X Q. 137. Does that involve any mathematical calculation? You said it is approximately located?

A. Yes, sir. Practically.

X Q. 138. Did you just say "I will allow so much for the mast and so much for the two funnels," or did you have a formula for working that out?

A. Well, there is a formula.

X Q. 139. Did you work this out by it?

A. I did not.

[fol. 111] X Q. 140. So you drew this plan and then you looked it over and said, "I suppose that point "G" is about there."

A. These plans, sir, were never supposed to be accurate within an inch or two.

X Q. 141. Within an inch or two?

A. They were supposed to be drawn more diagrammatically, to show the result of the movement relating to the stability of the vessel. Movement of "G."

X Q. 142. So on the plan Bennett's 2, where you show "G" above "M," it doesn't follow that according to the scale of the plan it was four feet above "M"?

A. Oh, no. No. Those positions, one to the other, are all approximate, and they are all placed based on a long experience and work in designing cargo ships.

X Q. 143. Why did you put "G," on Bennett's 2, right at the intersection of the middle line of the deck line?

A. I didn't put it there. It happened to come there, in my judgment.

X Q. 144. But you didn't take any measurements to put it there?

A. No, sir. I approximated that center of gravity of the cargo in the hold and on the deck.

X Q. 145. Well, the fact that on Bennett's 2 you show the center of gravity as above the meter center is simply, then, your best judgment and approximation?

A. Yes, sir.

X Q. 146. And how much coal did you say you used in making that judgment?

A. I didn't ever say I had used any coal in making that judgment.

X Q. 147. Can you say now?

A. Yes, sir. I gave the ship the benefit of the doubt, and I considered the bunkers as about half filled. Now if they were more than half filled the center of gravity would go up.

X Q. 148. If they were more than half filled the center of gravity would go up?

A. Yes. Naturally. Above a half. Every foot you put into the coal bunkers, which is the lower weight, naturally would move the center of gravity up. On the other hand, if the coal bunkers had no coal in them at all, then the center of gravity is too high. I gave the ship the benefit of any doubt and considered the bunkers as half filled. And I considered every water tank in the double bottom as pressed up hard.

[fol. 112] X Q. 149. How much coal did you figure on?

A. I figured on about four hundred tons, approximately.

X Q. 150. Well, are you sure that point "G" would be above point "M"?

A. Absolutely. Yes, sir. In exhibit 2. There is no question in my mind at all that point "B" was above "M."

X Q. 151. Based upon your approximation?

A. And my experience.

X Q. 152. Yes, but on no calculation?

A. No, sir.

Redirect examination.

Mr. Thompson:

Q. 99. Now, I think you said that various points on these different plans, being numbers 1, 2, 3, 4, 5, and 6, were within an inch or two of being accurate?

A. Yes.

Q. 100. Do you mean an inch or two on the plan or on the ship?

A. Oh, on the ship itself. An inch or two on the ship, itself.

Q. 101. Is there any relation between freeboard and stability?

A. Yes. There is a very material relation.

The Court: He has gone all into that fully.

Mr. Thompson: No, Your Honor. I don't think so.

The Court: I thought he had. Well, go ahead.

A. There is a very material relation.

Q. 102. What is it?

A. As long as you have the side of the ship above the water, then as you keel your righting-arm increases. Then a vessel with twenty feet freeboard has a very much greater range of stability than one with only a foot of freeboard.

Q. 103. You testified on cross-examination something to the effect that a vessel is designed to make it roll with safety an arc of thirty degrees. Do you recall that? In designing a ship, you design her so that she can roll with safety on the seas thirty degrees.

A. No, sir. We don't design the ship that way. That is, deliberately. But we have in mind, of course, certain ranges of safety based on the trade she is to be in. And on general freight boats we consider that she wouldn't lose

stability to a considerable extent in less than thirty degrees heel.

[fol. 113] Q. 104. Could the Nidarholm, in your opinion, have rolled an arc of thirty degrees, in the condition she was at the time she left her dock at Murray on the trip in question?

A. She could have rolled it, but she would never have retained her deck load. That is a moral certainty.

Q. 105. You stated that you put the cargo on these plans on the port side in the worst possible position?

A. I tried to move the center of gravity of the extra load as far outboard as possible.

Q. 106. Would you consider a ship with a cargo such as has been described in this case—taking the ship in this case—safe to start on a voyage with a five degree list?

A. I would not.

Mr. Duncan: I offer this plan, too.

(Claimant's Exhibit 2 for Identification offered, with no objection; admitted.)

Recross-examination.

Mr. Duncan:

X Q. 153. You said this Nidarholm would roll thirty degrees?

A. Yes.

X Q. 154. But she wouldn't keep her deckload?

A. No.

X Q. 155. What did you mean by that? A. Why, she would shoot it overboard.

X Q. 156. Supposing the lashings and stanchions had been strong enough to keep it. Do you mean that the stanchions would break and let it go overboard?

A. No. I mean she would have shot it over the top of the wooden bulwarks.

X Q. 157. But you think she could have rolled thirty degrees safely? How do you think she could have rolled thirty degrees safely?

A. If she had discharged that part of the cargo which she would have done.

X Q. 158. Well, assuming that she didn't discharge it?

A. I don't think she could.

X Q. 159. How far do you think she could have gone over safely, without discharging part of it? Or rather, without discharging any of it?

A. Probably fifteen to eighteen degrees.

[fol. 114] X Q. 160. On a ship like the Nidarholm, leaving for the trip like she did leave for how much of a list or a roll should the cargo be secured—the deck cargo—be secured to withstand?

A. Probably ten degrees. Or Fifteen to twelve degrees, I will say; each side of the center. Probably more. Probably fifteen degrees each side of the center.

X Q. 161. And that means in a trip like the Nidarholm undertook you need not foresee any more than a fifteen degree departure from the perpendicular?

A. No, I don't understand that.

X Q. 162. Well, what is your margin of safety, if you are loading a deck cargo; how much of a slant off the perpendicular have you got to be prepared to meet? I am not speaking of stability now, but I am speaking of a ship either through a list or rolling from the sea——

A. I understand. Why, the bulwarks in a ship like the Nidarholm should be sufficiently strong to take care of any ordinary roll that is liable to be encountered. And it is very seldom that you encounter rolls of more than twenty degrees each side of the center.

X Q. 163. Well, does it follow, then, that if you were in charge of securing the deckload of a vessel like that that you would so secure it to withstand twenty degrees from the perpendicular?

A. No, sir. You have something in mind. All construction has factors of safety in it, and when you say you construct a bulwark to prepare for a rolling of a ship twenty degrees each side of the center, nobody means that beyond twenty degrees the thing is going to damage; the thing is the factor of safety. When you get beyond that you are getting into conditions that you are going to discharge your cargo. So that while the actual load on the side may increase theoretically, it is going to decrease practically because you are losing it overboard. One of the things we have to contend with is this—it is a greater menace in ships like this than the ordinary lumber carrying ship—and that is when water gets on deck; of floating the cargo.

X Q. 164. If you were called in, as a consulting naval engineer, to advise how much pressure the stanchions must [fol. 115] be prepared to hold in a case like the Nidarholm, —and when I say stanchions I mean stanchions and lashings—side retainers—what would be your answer, in terms of degrees off the perpendicular?

A. If I was called upon to design bulwarks, without any prior experience of people who had operated these things, but designed from an enigneering point of view purely, I would figure on a twenty degree roll each side of the center line of the ship, and then proportion the various structures to meet that, with probably a five to seven and a half percent factor of safety.

X Q. 165. Twenty degrees, plus five to seven and a half degrees tact or safety?

A. Not degrees. Percent.

X Q. 166. Percent?

A. Yes, sir.

Redirect examination.

Mr. Thompson:

Q. 107. When would those stanchions, Mr. Bennett, receive a greater strain; when the ship was roling in a seaway or when she had a list of five degrees to support which gradually increased to something over ten?

A. Why, when she had a permanent list of five, which increased to ten. In that case you have got a continuously imposed load on the side bulwarks which is increased as the ship heels. In the other case, where the ship is rolling—and of course I am taking the same number of degrees into consideration in each case—you have a load on the side which starts from nothing and gradually increases, as the ship inclines and then gradually decreases again as the ship goes back.

(Witness excused.)

[fol. 116] [Title omitted]

January 26, 1928.

Hearing before Hon. Clarence Hale, U. S. District Judge, beginning at nine-thirty A. M., on the above date, previous

testimony on both sides in this case having taken out by deposition, etc., on August 4th and on other dates.

CHRISTIAN MICHELSEN, witness called by counsel for Claimant, having been duly sworn, testified as follows:

Direct examination.

Mr. Duncan:

Q. 1. Will you state your full name?
A. Christian Michelsen.
Q. 2. Where do you live?
A. In Watertown Massachusetts.
Q. 3. How old are you, Captain?
A. I am sixty years old.
Q. 4. What is your business?
A. Master mariner.

The Court: What was he, in this transaction?

Mr. Duncan: I am going to put him on as an expert. He has no relation to the facts of the case.

Q. 5. And what are you doing at the present time?
A. I am doing pilot duty.
Q. 6. Where?
A. Over Nantucket Shoals, between here and New York, and Baltimore and different places on the coast.
Q. 7. What license do you hold?
A. Master's license, and pilot's for the coast, sir.
Q. 8. Now going back to your experience; will you tell the Court briefly your experience as a mariner?
A. Well, I have followed the sea all my life, from the time I was fourteen years old, in various positions; able seaman up to master.
Q. 9. When did you get your first master's license?
A. I had my first master's license in 1906.
[fol. 117] Q. 10. Now, were you born in Denmark?
A. Yes.
Q. 11. And you went to sea at first in Danish ships?
A. Yes.
Q. 12. And when did you come to this country?
A. When I was eighteen years old.
Q. 13. And what type of ships had you had experience on during the period before you got your master's license?

A. Why, all sorts of ships, from schooner to square-rigged.

Q. 14. Any steam?

A. Steam also.

Q. 15. Did you have any experience with ships during that period carrying a deck cargo?

A. As a young man?

Q. 16. Yes?

A. Yes. I did. I was in schooners, in the old country.

Q. 17. What kind of a deck load?

A. Why, pulpwood—not pulpwood, but props from Norway. But not any vast experience.

Q. 18. Now, coming to the time after you got your master's license; from 1906 on, what, in general, has been your experience and duties?

A. My experience as a master,—why it is the same as any other master of a ship.

Q. 19. What, briefly, ships have you been on?

A. Well, since 1914, I got my first permanent license. That was on the steamer Arlington in the New England Coal & Coke Company. 1914. I brought her down through the lakes.

Q. 20. How long were you on her as master?

A. Five years.

Q. 21. Carrying what type of cargo?

A. Coal entirely. We had one cargo of lumber from New Brunswick down to New York. The first cargo I had in her. After that it was all coal.

Q. 22. What did you do after you left her?

A. After I left her I went on the Steamer Winona County, as master.

Q. 23. Then what next ship did you have?

A. The next one that I had was the Steamer Suffolk.

Q. 24. That is one of the ships of the Coastwise Transportation?

A. Yes.

Q. 25. How long were you master of the Suffolk?

A. Three years.

[fol. 118] Q. 26. What trades were you in, on the Suffolk?

A. In the coal trade first, between Norfolk and here, and then we went out on the west coast after lumber.

Q. 27. And brought in a cargo of lumber?

A. Yes. Back to New York.

Q. 28. Where did you get the lumber?

A. Willow Park and Tacoma. Part of the cargo in each port.

Q. 29. What size ship is the Suffolk?

A. About 8,000 tons dead weight.

Q. 29. And how long?

A. 400 feet.

Q. 30. And what is the beam?

A. 52 feet. Within an inch or so.

Q. 31. What type of wood did you bring back on her?

A. Lumber. Sawed lumber.

Q. 32. Did you carry any deck cargo?

A. Yes.

Q. 33. How high a deck cargo?

A. We had fourteen feet.

Q. 34. Have you read the testimony of the captain and the mate of the Nidarholm, and of the pilot Carmichael, that has already been given in this case?

A. I have read it over. Yes.

Q. 35. You are familiar with the situation, so far as it appears in the record, in regard to the condition of the Nidarholm when she left the dock, and the circumstances leading up to the loss of the deck cargo?

A. Yes. According to the record.

Q. 36. And assuming, Captain, that the Nidarholm had a list of five degrees to starboard before she left the dock, and assuming that she was loaded as the record states, and assuming all the facts that bear on the matter that appear in the testimony, have you formed an opinion as to whether or not she was a seaworthy ship when she left the dock?

Mr. Thompson: He can answer that by "yes" or "no."

The Court: Yes. Answer it "yes" or "no."

Q. 37. Answer that "yes" or "no."

A. Yes. I have.

Q. 38. What is that opinion?

Mr. Thompson: I object, on the ground that the master has not qualified to state his opinion as to that. He stated [fol. 119] he had never carried any pulpwood cargo in his life, other than the Norwegian props, in a sailing vessel.

He carried one lumber cargo from the west coast and the rest appeared to be coal.

Mr. Duncan: Your man testified, last week, that he never carried any.

The Court: I think he has some qualification as an expert. Your objection clearly goes to the probative value of the testimony. He may answer.

Q. 39. What is that opinion?

A. My opinion, according to the testimony, is that the ship was seaworthy.

Q. 40. On your trip on the Suffolk, from the Pacific coast, to which you have referred, did the Suffolk have any list when she left port on the Pacific coast?

A. Yes. A slight list.

Q. 41. Do you know about how much?

A. I don't. I don't remember how much it was. It was a slight list.

Q. 42. What is your best recollection?

A. Well, a few degrees.

Mr. Thompson: I object. If he doesn't know, he doesn't know. He says he doesn't know how much it was.

A. No. I don't know how much it was.

Q. 43. What was the action of the Suffolk, shortly after she left on her trip from the Pacific coast?

A. Well, she— As she was leaving port she was very cranky going down river. When we changed the helm from port to starboard she would list more; considerable.

Mr. Thompson: Does the fact that the Suffolk acted cranky out there prove that this ship was seaworthy; or does it prove that the Suffolk was also unseaworthy when she started?

The Court: I think clearly it can be brought on cross-examination as tending to show what his knowledge about the matter is. I will let it go into the record.

Q. 44. Go ahead, Captain? What happened on that trip, with regard to the list of the Suffolk?

The Court: If there is any question about it, take an exception.

Mr. Thompson: I think I will, to keep the record straight.

(Exception allowed and noted.)

[fol. 120] The Court: I think——

Mr. Duncan: I will admit it is pretty far.

The Court: I think it is going pretty far. If there was a jury to be misled in any way I will say frankly I shouldn't admit it. But, on the whole record, I think clearly it is something that can be brought out in cross-examination. If you want to take the risk of it, subject to objection, I will admit it.

Mr. Duncan: I think I'll let it stand.

Q. 45. What happened after that, Captain?

A. After we got outside, the first day or so we had quite a breeze from the westward—no, not from the westward; from the eastward; and she listed over to starboard. And she listed over with about an eight degree list.

Q. 46. How long did it take you to go from your point of departure down to the Canal?

A. How many days?

Q. 47. Yes. Approximately.

A. I don't remember exactly. About eighteen days. I haven't looked up the record.

Q. 48. All right. Eighteen days is all we want. And what was her condition when she reached the Canal?

A. She had from eight to ten degrees list until a couple of days before we got to the Canal. After that she listed over considerably more, and the day we arrived she had between fifteen and eighteen degrees. I don't remember just how much. But so much that the pilot refused to take us through the Canal.

Q. 49. Why?

A. Because she wouldn't go through the locks safely.

The Court: She had so much list?

A. She had a very extensive list. Yes, sir. Coming down we used our coal and water continually, from the bottom of the ship, and naturally that brought her more over.

Q. 50. While at sea you have observed a great many ships with deck cargo?

A. Yes, sir. I certainly have.

Q. 51. What can you state, with regard to whether or not those ships in general had lists?

Mr. Thompson: I object.

[fol. 121] Mr. Duncan: The captain testified in his deposition that a large proportion of ships with deck cargo had lists; that it was a natural and usual thing.

The Court: Who said so?

Mr. Duncan: The captain of the Nidarholm in the deposition we first took when Your Honor wasn't present. The witness last week for Mr. Thompson gave his opinion that, as I remember it.—I haven't had an opportunity to read the testimony—that not more than five percent of ships with deck cargo had a list. I want to pursue that a little bit further, and I want to ask this witness from his experience and observation what in his opinion—what his opinion is, with regard to that point.

The Court: Subject to the objection of counsel on the other side, I will allow him to say.

Q. 52. Did you get the question, Captain?

A. Yes.

Q. 53. And what can you say, on that point?

A. I would say fifty percent of ships that have got a deck load have got a list. Lumber cargo.

Q. 54. Have you ever seen ships with deck cargo leaving port?

A. I have seen several coke boats leaving port with very extensive lists.

Q. 55. With what deck cargo?

A. Coke.

Mr. Thompson: Deck loads of coke?

A. Yes, sir.

The Court: Of what?

A. Coke.

The Court: Coke?

A. Yes, sir.

The Court: How would they carry a deck cargo of coke?

A. Well, they did, Your Honor. I haven't seen it in later years, but in 1911 and '12 in Baltimore there was quite a number of cargoes of coke left here for different ports. I don't know just where. British ships.

The Court: Steamers?

[fol. 122] A. Steamers. Yes. I noticed them especially, because they had such a list, and I made inquiry as to

whether they went to sea in that condition and the purser told me it was nothing unusual; the only difference was that it would throw the compass out until they could get observation and deviation.

The Court: What would throw the compass out?

A. The list of ship would change the deviation of the compass. If a ship listed over the compass would change; and that is the only thing that seemed to be worrying them. I thought it was pretty dangerous to go to sea that way, but they said it was nothing unusual.

The Court: You thought it dangerous?

A. With that extreme list I didn't think it was a wise thing to do. However, they told me it was a very usual occurrence.

Mr. Thompson: I suppose that is all subject to objection?

The Court: Yes.

Mr. Duncan: Well, His Honor brought it out.

The Court: I should think—Well, I think it would better stay, for what it is worth. Subject to objection.

Q. 56. Captain, have you seen this? You just saw this, this morning, for the first time?

The Court: Well, what is "this."

Mr. Duncan: Claimant's Exhibit 2 for Identification.

The Court: Same being what?

Mr. Duncan: Same being a plan of the S. S. Nidarholm, which was produced by Mr. Bennett last week and by me put in evidence.

Q. 57. Have you observed the shrouds shown on this plan?

A. Yes.

Q. 58. Now, Captain Michelsen, last week Mr. Bennett, whose testimony you haven't had an opportunity to read, testified that the shrouds of the Nidarholm were twelve feet apart at the deck and about seven and a half feet apart at the top of the deckload; and he gave it as his opinion, as I remember it, that it was rank nonsense that the shrouds would be of any effect in retaining the deck cargo. Are you able, from the observation which you have made and [fol. 123] from this plan showing the shrouds, to state whether or not in your opinion those shrouds would be of any value in retaining the deck cargo?

Mr. Thompson: That wll be answered "yes" or "no."
The Court: Yes. "Yes" or "no."
A. Yes.

Q. 59. What is that opinion?

Mr. Thompson: I object. Mr. Bennett stated specifically that that plan marked "Claimant's 2 for Identification" is not drawn to scale. How can a man take that plan and judge whether or not the shrouds are going to support anything by that?

Mr.. Duncan: I think I can satisfy that by producing plan drawn by Mr. Bennett with regard to which he distinctly stated that the shrouds were drawn to scale. And I will ask you to look at that. "That" being "Bennett's Exhibit 1 for Identification."

The Court: Subject to objection, he may answer.

Mr. Thompson: Well, what was the question?

The Court: Well, he said he had formed an opinion.

Mr. Duncan: Can it be understood that that opinion is also based upon his observation of that plan?

Mr. Thompson: The plan he now refers to has no shrouds in it at all.

The Court: Then his testimony fails of probative value.

Mr. Duncan: I think my question also included a summary of Mr. Bennett's statement that there were three shrouds——

Mr. Thompson: Well, you are assuming Bennett's plan is correct—— Just what was the question, anyway?

(Question repeated by reporter.)

Q. 60. I perhaps should add something to that. Adding to that question—assuming the facts as stated by Mr. Bennett to which I have referred to are true—namely, that the shrouds are twelve feet apart at the deck and seven and a half feet at the top of the deck-load—on the face of all those things, can you form an opinion as to whether those shrouds would help retain the deck cargo?

[fol. 124] The Court: "Yes", or "no."

A. I say yes.

Q. 61. What is your opinion?

Mr. Thompson: I object.

The Court: He may answer, subject to objection.

Mr. Duncan: On what ground do you object now?

Mr. Thompson: On the ground that the witness is wholly unqualified to answer that question as he stated specifically that he never carried a cargo of pulpwood.

The Court: I will allow him to answer, subject to objection.

Q. 62. All right. Captain, what is your opinion?

A. I will state my opinion from experience—from what I have seen in my experience going to sea.

Mr. Thompson: Well——

Mr. Duncan: Well, let him finish his answer.

A. To begin with, I never saw a shroud that was twelve feet apart.

Mr. Thompson: His whole testimony is based on the assumption that Mr. Bennett's testimony is correct.

Q. 63. Can you answer that question, Captain?

The Court: You say you have never seen shrouds like that?

A. Yes.

The Court: Now, go on and answer. Let him answer.

A. But, in my judgment, a shroud will hold a cargo of that kind; help to hold a cargo of that kind as a lashing. If that will answer your question.

Q. 64. Now, Captain, have you read the testimony of the Captain and the first officer with regard to this lashing—proposed lashing—on each side?

A. Yes. I saw that.

Q. 65. What do you think the value of a lashing like that would be?

Mr. Thompson: I object.

The Court: What was the question?

Q. 66. I asked him what he though- the value of a lashing like that would be for retaining the deck load?

[fol. 125] Mr. Thompson: It wouldn't be put there for that purpose at all. It was to be put there to sustain the stanchions.

The Court: Well, never mind. He may answer.

Q. 67. What was the value of it?

A. One lashing would be of no value. If there was a lashing on to the stanchions it would be a lot of support to the deck cargo. But one would be useless.

Q. 68. When you loaded a cargo of lumber on the West Coast, about which we were talking a while ago—or the ship loaded it—who had charge of that. Did the ship load, or did the charterers load?

A. The stevedores loaded the cargo.

Q. 69. Well, who superintended it?

A. The master of the ship.

Q. 70. Well, that was yourself, wasn't it?

A. Yes.

Q. 71. Assuming that a ship acted as the Nidarholm did, from the testimony, Captain, first having a list to starboard when she left the dock and changing on to a port list after she straightened out, or as she straightened out, will you state whether or not in your opinion that action of the ship would indicate anything with regard to the permanency of that list to port which she took?

Mr. Thompson: I assume my objection will follow all down through here?

The Court: He may answer.

A. Read that question please?

Q. 72. Perhaps I can put it better this way——

The Court: Strike that other out.

Q. 73. Mr. Bennett last week testified that the action of that ship in going first to starboard and then to port showed that it was in a very unstable condition. Now, what I want you to tell me, if you know, and tell the Court, is whether—what that action of the ship means to you, with regard to the condition of the list which she finally took. Is the fact that she went over five degrees any indication that she is going over further, or does it indicate anything to you with regard to continuing the list?

The Court: He may answer, subject to objection.

A. In my opinion I would say the ship was cranky.

[fol. 126] Q. Your opinion is that the ship was cranky?

A. Yes. At that time.

Q. 75. And what does that indicate to you with regard to seaworthiness?

A. Well, that wouldn't affect the seaworthiness of the ship; her being cranky. Of course, it is according to how far she did go over. There is a happy medium in everything.

Cross-examination.

Mr. Thompson:

X Q. 1. Captain, whose testimony did you read in this case?

A. The captain of the ship and the chief officer and pilot.

X Q. 2. Just the three of them?

A. Yes.

X Q. 3. And from the testimony that you read what did you understand was the extreme list that the Nidarholm took prior to the time this deck cargo left her?

A. From ten to fourteen degrees. Previous to the deck cargo leaving.

X Q. 4. Then up to the time the deck cargo started you understand she listed fourteen degrees?

A. Yes. Just previous to the deck cargo starting.

X Q. 5. If, Captain, that ship had taken ten to fourteen degrees list while she was in port with her tanks full and coal bukers full, you would naturally expect that list to increase as the contents of the tanks were consumed during the voyage?

A. That is all according to the condition of the cargo. Where it was.

X Q. 6. Assuming that the cargo remained the same; that the water and coal were consumed; you would naturally expect the list to increase?

A. I would to a small amount.

X Q. 7. Well, how much of an amount?

A. I can only answer that by the experience I had on the Suffolk. For a period of about eight or ten days we didn't increase our list over two degrees.

X Q. 8. Well, what was the Suffolk's list when you started to enter the canal? When the pilot refused to take you through?

A. At that time it was between fifteen and eighteen degrees.

X Q. 9. Between fifteen and eighteen degrees?

A. Yes.

[fol. 127] X Q. 10. And when was the eight degrees that you testified to, with reference to your starting time?

A. About one or two days after we left Seattle

X Q. 11. And she gradually increased?

A. The first week or ten days she didn't increase that list noticeably at all.

X Q. 12. It depends of course on how fast you are using your coal and water?

A. Oh, yes. Or according to the wind. A severe wind——

The Court: You say she increased her list from eight degrees so that when you got to the Canal she was between fifteen and eighteen degrees?

A. Between fifteen and eighteen. Yes. Getting pretty cranky then.

X Q. 13. If your ship had fifteen to eighteen degrees list, or ten to fourteen, at the time you left port, you wouldn't have left?

A. I wouldn't have left until I found what was the matter with the ship. Most likely not.

X Q. 14. And if she had taken a list of ten to fourteen degrees a few minutes after leaving port, while she was still in the harbor, you would have found out before leaving further?

A. Well, there are many cases——

X Q. 15. No. You would have found out before proceeding further?

A. Most decidedly I would. Yes. I would have wanted to know what was the matter with the ship. Yes.

X Q. 16. With the exception of this deck cargo that you carried in the Suffolk, and the coal cargo you carried down from the Provinces, have you carried any deck cargo in American ships?

A. Yes. Schooners.

X Q. 17. In American steamers, I meant to say?

A. No, sir. Not with steamships.

X Q. 18. You haven't been in schooners since when?

A. Not since 1910.

X Q. 19. Will you tell us how you understand that lashing that was run thwartship at the foremast was connected up?

A. How I understood?

[fol. 128] X Q. 20. Yes? You say that lashing, if it was a single lashing, was in your opinion of no value? Will you tell us how you understood the lashing was made fast?

A. From the top of the stanchion to the mast, on one side. And from the mast over to the stanchion on the other side. As I understood it. On top of the load. On top of the deck load.

X Q. 21. You made an answer to Mr. Duncan that in your opinion this lashing wouldn't have any tendency to support the cargo? Is that correct?

A. To a certain extent.

X Q. 22. No. You said before— Am I right in that? You said you did not know— You said you didn't thing a single lashing would be of any benefit in supporting the pulpwood cargo?

A. Everything has a benefit. If I stood and hold my hand there it is a benefit.

X Q. 23. Then you will change your former testimony? You say now it would have some benefit?

A. Yes. Some.

X Q. 24. And it would have extreme benefit in supporting that particular stanchion that it was made fast to at each end? That particular stanchion?

A. That particular stanchion. Yes.

X Q. 25. And if that stanchion was joined together with several other stanchions by a heavy timber, it would be of great benefit in supporting those other stanchions, too?

A. Yes. But according to how heavy timber it is.

X Q. 26. And also how those stanchions were made fast, one to another, with the timber?

A. All according to the heft and thickness of this timber. Yes, sir. Naturally it would.

X Q. 27. How did you understand those stanchions just opposite the foremast on the Nidarholm on the trip in question were joined together?

A. How did I understand it?

X Q. 28. Yes?

A. Just by the description.

X Q. 29. Well, what is your idea of it, from the description?

A. My idea of it was, there would be a lashing from the stanchion to the mast.

X Q. 30. From one stanchion?

A. From one. Yes.

[fol. 129] X Q. 31. Well, did you understand that that one stanchion was joined with another stanchion by timbers?

A. Yes. A plank going fore and aft.

X Q. 32. And how many stanchions did that plank cover, in your opinion, as formed from the testimony?

A. According to the testimony it covered three stanchions.

X Q. 33. Well, wouldn't that wire lashing running across there to one stanchion which was joined with two other stanchions by plank, have a help or tendency to support all three of those stanchions?

A. It would help in a general way. There is no question about that.

X Q. 34. Well, the amount of help depends on how the three stanchions were joined together?

A. I didn't understand that. The amount of help?

X Q. 35. Yes. The amount of assistance that wire lashing would be depends on how those three stanchions were joined together?

A. Of course it does.

X Q. 36. Well, how did you understand those three stanchions were joined together, from the testimony you read?

A. Joined together by boards nailed on the stanchions.

X Q. 37. No timbers at all.

A. There were no timbers there. There was a plank there.

X Q. 38. How big a plank?

A. I don't remember exactly. It didn't appear to be very big, when I read the testimony.

X Q. 39. Weren't the dimensions given in the testimony?

A. Yes. They was. But I don't recall just what it was. But when I read it I didn't think it was supporting.

X Q. 40. Then you want to leave your testimony that that lashing was of some benefit?

A. It was of some benefit. Yes.

X Q. 41. And if the owners or stevedores had suggested putting it on, to you, as master of the ship, you would have put it on?

A. I don't know as I would. I don't think I would.

X. Q. 42. Why not? If it would be of any benefit? Do you see any objection to it?

A. I don't know as there would be any objection to it. [fol. 130] No. If they wanted to put it on, I would let them put it on. I wouldn't object to it.

X Q. 43. You can't see where it would do the ship any harm?

A. It wouldn't do the ship any harm. No.

X Q. 44. What do you mean by a "cranky ship"?

A. Why, a ship is cranky when she is going from one side to another without the least cause.

X Q. 45. What would cause a ship to be cranky? What causes a ship to be cranky?

A. Her being top heavy.

Redirect examination.

Mr. Duncan:

Q. 76. When a ship is cranky or top heavy, as you have talked about with Mr. Thompson, is there any way of telling how far over she is going to go?

A. No. There is no way of telling. The ship goes over to a certain distance, and then she gets her bearing.

X Q. 77. What do you mean when you say "she gets her bearing"?

A. Well, I can't explain it. That is the scientific part of it, which I don't know anything about.

X Q. 78. Well, I am not asking for a scientific explanation, Captain. What do you mean when you say she gets her bearing? If she goes over to a certain extent and gets her bearing?

A. She goes over to a certain point and gets her bearing. Yes.

Q. 79. Well, what is her action after she has gotten her bearing with regard to moving?

A. Well, after she gets over she gets more surface. It is hard to explain it. I know; but it is hard to explain. I know how it is, but I can't just explain it.

X Q. 80. Well, I am speaking now with regard to steadiness in the water. After she has gone over and got her bearing, what is her condition with regard to steadiness?

A. After she finds her bearing she will steady on that point.

Q. 81. Will a change of helm affect her?

A. After she gets her bearing? The change will affect her some. Yes. But not so much as when she is straight. [fol 131] Q. 82. Captain, which ship will roll more violently; a stiff ship or a tender ship?

A. Well, there is very little difference in the roll. All ships will roll. But when a ship is stiff she will strain the hip more. There will be more of a strain on her shrouds and rigging than if the ship is lighter loaded.

Q. 83. Than what?

A. Than as if a ship is not—a heavy load is iron ore and that sort of thing, and a light load is lumber. That is the best I can explain it.

(Hearing completed at 10:30 o'clock A. M.)

DEPOSITIONS

Proctor for Claimant and Cross Libellant introduced the Depositions taken August 4, 1927, as follows:

[Title omitted]

Depositions of witnesses in behalf of the Steamship "Nidarholm," taken at the office of Nathan W. Thompson, Esq., 85 Exchange Street, Portland, Maine, beginning at one o'clock, P. M., daylight saving time, on Thursday, August 4th, 1927, before O. D. Hooper, a Notary Public and shorthand reporter, under the following stipulation:

STIPULATION REDEPOSITIONS

It is hereby stipulated and agreed by and between counsel in the above entitled action that the depositions of officers of the Steamship "Nidarholm", attached hereto, may be taken by O. D. Hooper, Notary Public; that they may be

taken in shorthand, signing, filing, certification and other formalities being waived; and that said depositions may be used in the above entitled action in the same manner as if the witnesses had been heard in open court, and also in any cross-action which may be brought by the owners of the Steamship "Nidarholm". Stenographer's fees for the taking and transcribing of said depositions shall be a taxable disbursement.

[fol. 132] CHRISTOPHER CHRISTOPHERSEN, witness called in behalf of the Steamship "Nidarholm," having been duly sworn, deposed and said as follows:

Direct examination.

Mr. Duncan:

Q. 1. What is your full name, Captain?

A. Christopher Christophersen.

Q. 2. Where do you live?

A. In Kragero, Norway.

Q. 3. You are now the Master of the Steamship "Nidarholm"?

A. Yes, sir.

Q. 4. Who are owners of the Steamship "Nidarholm"?

A. Rederi. A. S. Nidaros.

Q. 5. And that is a Norwegian company?

A Yes. Registered in Oslo.

Q. 6. How long have you been Master of the Nidarholm?

A. Since August, 1925.

Q. 7. What cargoes have you carried in her since you have been Master?

A. We have carried two lumber cargoes before.

Q. 8. Before this charter?

A. Before this charter. Yes. And we have also carried coal cargoes.

Q. 9. Well, I just wanted it in a general way?

A. Cement and ore, and phosphate; lumber and licorice root; and cotton.

Q. 10. And cotton?

A. Yes, sir.

Q. 11. Which of those cargoes included deck stowage?

A. The lumber cargoes.

Q. 12. Where were they carried from and to?

A. From Archangel, Russia, one cargo to Hull, and the second cargo Sharpness.

Q. 13. That is England?

A. Yes, sir. One on the east coast and one on the west coast.

Q. 14. What kind of lumber were you carrying?

A. The lumber cargo to Hull was round wood that is, it is bigger than props and smaller than logs. They are really logs, but a smaller size. They run from six feet up to ten. Most of the cargo we had at that time ran about eight feet long and of different thicknesses.

[fol. 133] Q. 15. Now, Captain, in carrying those cargoes——

A. The other lumber cargoes was sawn wood.

Q. 16. In both of them you had part of it on deck?

A. Yes.

Q. 17. Did you have any experience with the listing of the vessel in carrying those two cargoes?

A. She had a list both times.

Q. 18. How much of a list? In each case?

A. When we left Archangel we had about four to five degrees list. As we got out into the sea and got into rough weather she listed all the worse.

Q. 19. That is on both cargoes?

A. Yes.

Q. 20. On both trips about the same?

A. Yes. About the same.

Q. 21. Now, coming down to the present charter party—to see if we can cut corners a bit—the Nidarholm was chartered to the Oxford Paper Company on May 10, 1927?

A. Yes, sir.

Q. 22. And the vessel was placed at their disposal on the 19th of May?

A. Yes. In Philadelphia.

Q. 23. In Philadelphia?

A. Yes. Or in Camden, New Jersey. That, I believe, actually belongs to the Port of Philadelphia, because all the Custom House business is done in Philadelphia.

Q. 24. You were on the ship at that time?

A. Yes, sir.

Q. 25. What were the first orders you received?

A. To proceed to Hampton Roads and load a cargo of coal for Port Alfred, P. Q.

Q. 26. Did you do that?

A. Yes, sir.

Q. 27. How did the vessel act on your trip from the Roads up to the port of discharge?

A. Oh, just as usual. Fair weather. Foggy, but didn't encounter anything. She acted just as usual on a coal cargo.

Q. 28. What were your next orders, after you got to Port Alfred?

A. After we got to Port Alfred, then we proceeded to Quebec to dry-dock the ship, and after that we went to Murray.

Q. 29. Why did you dry-dock at Quebec?

A. For bottom examination. Bottom repairs.

[fol 134] Q. 30. What was the nature of the repairs you made at that time?

A. Put in some new plates and took out some bottom plates and straightened them; and also effected some reparis to the engine.

Q. 31. How long were you there at Quebec? Just in a general way?

A. Let me see. I think we were in dry-dock eighteen or nineteen days; I forget which.

Q. 32. Then you went to Murray, Nova Scotia?

A. Yes, sir.

Q. 33. How did the vessel act on the trip from Quebec to Murray?

A. Just as usual on a ballasted ship.

Q. 33. Did she ride with an even keel?

A. So far as I remember she did. I don't remember that she had any list at that time.

Q. 34. When you got to Murray what happened then?

A. Then we commenced loading.

Q. 35. And what did you load?

A. A cargo of pulpwood.

Q. 36. Below the decks, or on deck?

A. Below the decks, and on deck.

Q. 37. How was the cargo loaded?

A. It was shot in through chutes. There is kind of an overhead transportation that brings the pulpwood from the

big pile and partly from the water through the sawmill where it is sawn into suitable lengths; and it is brought out on the conveyer and dropped down into the ship through the chute; just the same as they load coal.

Q. 38. Some of the cargo, you say, was loaded on deck, too?

A. Yes, sir.

Q. 39. Describe the method of loading that cargo on deck?

A. Well, when it comes off the chute ——

Q. 40. No. Pardon me just a minute. What I wanted to get at, I wanted you to describe how the retainers—how those side poles—are put up?

A. Before we start putting on the deck cargo stanchions are placed along the ship's sides. Big, wooden poles. An average of about twenty feet long. Some are longer and some a little shorter. They are placed about six to eight feet apart—I never measured it—in an upright position and secured to the bulwarks. Lashed to the bulwark stanch- [fol. 135] ions, and wedged off at the bottom; supported by chocks at the bottom. After that a lashing is placed diagonally from the ring-bolts in the hatch coamings and the other end of the lashing is made fast about half way up on the stanchions. That is, not all of these stanchions are supported by lashings. I think about every second or every third one.

Q. 41. Now, when that is up, Captain, how do they get the cargo? Drop it through the chutes?

A. Yes.

Q. 42. Is anything done with regard to stowing the cargo?

A. When they get a big pile under the chutes they stop dropping in that special chute and then proceed to distribute the pulpwood all over the deck.

Q. 43. Do they just throw it around?

A. Just stow it any way. They stow it as well as they probably can stow that kind of small pieces. And the first time, and also the second time, it was stored lengthways.

Q. 44. You have been talking about the first trip you made from Murray under this charter. You finished loading there and came to Portland?

A. Yes.

Q. 45. Did your ship have a list on that trip?

A. Yes.

Q. 46. Describe it?

A. She had a list to starboard. About five degrees.

Q. 47. Did she have that when she left the dock?

A. Yes, sir.

Q. 48. Did she maintain that list to starboard?

A. No. When she got away from the dock and started to turn around on a hard-a-port helm, then she righted up and went over to port.

Q. 49. How far over to port did she go?

A. About the same as she had before we started. About five degrees.

Q. 50. Did that vary on the way to Portland?

A. Not much. Just a little. Just a little bit as the wind shifted.

Q. 51. Did it vary at all as you went over the narrows?

A. Yes. As we went over the shallow water, she heeled a little bit more over to port.

Q. 52. And after you got out into deep water she came back to five degrees?

A. Yes, sir.

[fol. 136] Q. 53. And you came all the way to Portland?

A. Yes, sir.

Q. 54. Did you have any difficulty in manœuvering your ship?

A. No.

Q. 55. You discharged at Portland under orders and went back to Murray for another cargo?

A. Yes, sir.

Q. 56. Was there any difference in the loading and stowing of the second cargo, from the first; or was it the same?

A. The method of loading was exactly the same. Yes, sir.

Q. 57. When you had loaded the second cargo, and were ready to go, what was the condition of the ship with regard to any list?

A. The same as the first. She had about five degrees list to starboard after she was loaded, and as long as we stayed alongside the dock, and until we had backed away from the dock.

Q. 58. Was she leaning against the dock at all?

A. No. She was free.

Q. 59. Which side was against the dock?

A. The starboard side.

Q. 60. So that the list was toward the dock?

A. Yes, sir.

Q. 61. Were any of her mooring chains taut?

A. No. She was absolutely hanging free.

Q. 62. Now, you were lying against the dock with your starboard side to the dock, and describe the maneuvers in leaving the dock and starting to Portland?

A. We let go the moorings and put the engines half speed astern; slow astern to start with and then half speed astern. And then, when her bow was clear of the end of the dock, she was put full speed astern.

Q. 63. What about the helm?

A. The helm? As soon as we were going astern—The helm, as long as we were going astern, was kept amidships.

Q. 64. What is the course of the ship when you are going full speed astern and your helm amidships?

A. The action of the propellor will then drag the after end of the ship to port, so that the bow of the ship can swing to starboard.

Q. 65. What did you do next?

A. When we were well clear of everything, so that we had room enough to turn the ship around, the helm was put hard [fol. 137] to port and the engines were put at full speed ahead.

Q. 66. When you left the dock, you say, you had a list of five degrees to port?

A. Yes, sir. No. To starboard.

Q. 67. I mean to starboard?

A. Yes, sir.

Q. 68. When, if at all, did that list change?

A. As soon as the rudder was put hard-a-port and the engines had started to go full speed ahead.

Q. 69. What change occurred, with regard to the list?

A. What?

(Question read by reporter.)

A. Then, as soon as the ship got a little headway and was beginning to feel her helm, she straightened up and then gradually went over to port about five degrees.

Q. 70. Five degrees to port?

A. Yes, sir.

Q. 71. And you went on down the bay with that five degree list to port?

A. Yes, sir.

Q. 72. And that was just the same as it was the first trip?

A. Just the same. Yes, sir.

Q. 73. Now, a way down from the dock, there is some shallow water?

A. Yes, sir.

Q. 74. How far down is it?

A. About three miles. A little less, if anything.

Q. 75. How much water is there down there?

A. There is said to be twenty-four feet of water at high water in the channel.

Q. 76. What was the state of the tide when you went over there?

A. Just high water.

Q. 77. How much was your ship drawing?

A. So far as I remember we were drawing twenty-one feet and five inches aft.

Q. 78. You may refresh your recollection by looking at the log.

(Witness looks at log.)

A. Yes. Twenty-one feet and five inches aft; nineteen feet and four inches forward. That is, that was the draft of the center of the ship. But having a five degree list she would have drawn a little more out at the bilge. I don't know as you can understand that.

[fol. 138] Q. 79. Yes.

A. Being a flat-bottomed ship, the figures are placed in the center. When she heels over the outer edge of the flat bottom naturally would be deeper than the center where the figures are.

Q. 80. Well, that wouldn't — anything appreciable, would it?

A. Between one and two feet, I should say.

Q. 81. Between one and two feet?

A. Perhaps two feet. No; hardly two feet. Not over two and not less than one.

Q. 82. That's near enough. How long a distance did you have to go over the bar? How wide is the bar?

A. Let's see. I should say—Well, just judging from eye-sight, I should say it is a matter of about pretty close

to a thousand yards. Of course I never measured it. I wouldn't swear to that.

Q. 83. What happened with regard to the list, as you went over that bar, and got into shallow water?

A. As soon as we got into shallow water the ship began to "smell the bottom," as we call it. When there was less water under her bottom she began to sag a little more. List.

Q. 84. How far did she go?

A. To ten degrees. I went and looked at the clinometer, and I saw she was down to ten degrees.

Q. 85. The clinometer is an instrument on the bridge, which registers—

A. Yes. It is an instrument fastened to the binnacle.

Q. 86. Did she go over suddenly or slowly?

A. No. Very, very slowly.

Q. 87. Where were you at that time?

A. On the bridge.

Q. 88. Who else was on the bridge?

A. The pilot, and there was a man at the wheel.

Q. 89. Who was the pilot?

A. His name was Carmichael, I think.

Q. 90. Now, what is the next thing that happened, after she sagged slowly over to ten degrees?

A. That continued out through the narrows, and about half way down I heard a crack, and I looked over the wind shield. The sound came from the forward part of the ship. And I looked over the wind shield, and all of a sudden the [fol. 139] deck cargo started to roll over on the port side because the stanchions broke.

Q. 91. Is that both forward and aft?

A. No. Just on the port side forward, to start with. The next thing that happened was that when the deck cargo on the port side forward had rolled all off, the ship had become on much heavier on the starboard side that she rolled over very heavily, and when she rolled over on the starboard side all the cargo stanchions on the starboard side, both forward and aft, broke and all the deck cargo on that side of the ship, both forward and aft, rolled off. Then she rolled back again to port and broke her stanchions on the after deck on the port side, and all the deck cargo on that side rolled off. On the after deck. That is, all the cargo above the ship's bulwarks.

Q. 92. Go ahead? What happened next?

A. Then she just straightened herself up again and wobbled a bit and stayed up straight, and we proceeded out of the channel, and when we got out into deep water again we turned the ship around and went back to Murray and anchored.

Q. 93. What did you do after you had anchored?

A. After we had anchored the superintendent of the Oxford Paper Company—Mr. Harvey—came aboard, and we then agreed that we should take the ship alongside the dock to re-store her cargo and put up temporary stanchions.

Q. 94. And you did that?

A. Yes, sir.

Q. 95. Was anything said about putting some more cargo on board, to take the place of that that had been lost?

A. Yes. I asked Mr. Harvey if he wanted me to put more cargo on or not. But he said it would take so much time in discharging the part of the deck cargo that we already had aboard, in order to get sufficiently strong stanchions, to warrant a full deck cargo, he was of the opinion it was better to put up temporary stanchions and let the ship go with the cargo she had.

Q. 96. Did Mr. Harvey tell you this?

A. Yes. He conferred with some of the other men, of course; but that was the final decision they came to.

[fol. 140] Q. 97. Did he tell you that?

A. Yes, sir.

Q. 98. What next did you do?

A. Next we—not "we," but the employes of the Oxford Paper Company—put up some temporary stanchions—just planks—the balance of the cargo that we had was re-stored, and we left for sea next morning.

Q. 99. As you left, next morning, did the Nidarholm have a list?

A. No.

Q. 100. Did you have a list anywhere between there and Portland?

A. No. Nothing to speak of. She may have had a degree or two, but I don't recall it, and I never paid any attention to it.

Q. 101. You came to Portland and discharged the cargo?

A. Yes, sir.

Q. 102. Did you do anything in regard to making a protest?

A. I noted a preliminary sea protest. Yes.

Q. 103. Where is that protest?

A. I think that was left with the Oxford Paper Company.

Q. 104. And after you had unloaded at Portland, what was the condition of the Nidarholm, with regard to any damage done by this cargo rolling overboard?

A. After we had unloaded the ship I called down first, I went down around the decks, myself, to ascertain if there was any damage. And I found some damage to the bulwarks. So Lloyd's surveyor—Mr. Stewart—was called in, and he surveyed the ship and we found quite a lot of damage to her rails, bulwarks, and other things which you can find specified in this report from Lloyd's.

Mr. Thompson: Put that survey in, if you want to.

Mr. Duncan: I should like to. I offer in evidence the original report of survey by William Stewart, surveyor to Lloyd's Register, dated July 13th, 1927.

(Claimant's Exhibit 1 marked.)

Q. 105. Now, Captain, without going into too much detail, what, in general, was the injury?

A. The general nature of the damage was springing [fol. 141] broken rivets in the bulwarks, and the stanchions supporting the bulwarks; there was also damage to the steam pipe guards, that is, the guard plates protecting the winch piping; there was also one back stay on the foremast broken; and there was an air pipe to number one ballast tank on the starboard side forward broken; and the water service piping on the after deck, port side, was broken; the bulwarks were worse damaged on the starboard side, and also on the port side after deck; the port side forward deck was very little damaged; in fact it was only damaged, anyway, on one stanchion. That was on the port side forward, where the cargo first went.

Q. 106. Are those items of damage that you have just mentioned all contained—

A. They are all contained here, although this report is much more elaborate.

Q. 107. And did those injuries all take place when this deck cargo went overboard?

A. Yes. That was all caused by the deck cargo; and the reason for more damage on the starboard side than on the port side, especially forward, I can think must be this; that when she rolled over to the starboard side she rolled over so much more and the strain there was so much heavier than on the port side forward when the cargo first went.

Q. 108. How long have you held a Master's license?

A. I got my Master's license in 1905.

Q. 109. Have you been Master of ships ever since that time?

A. No. I first became Master in 1908.

Q. 110. Since 1908?

A. Yes, sir.

Q. 111. Been in steam all the time?

A. In steam all the time. Yes.

Q. 112. Carrying the general type of cargo?

A. Carrying general types of cargo. Yes.

Q. 113. Have you carried deck cargo before?

A. Oh, yes.

Q. 114. In other ships than the Nidarholm?

A. In other ships. Yes.

Q. 115. Have you seen many ships carrying deck cargoes?

A. Yes.

Q. 116. Now, Captain, when you put a deck cargo on a ship, what is the effect of it, with regard to the likelihood of the ship taking a list?

[fol. 142] A. The effect of putting a deck cargo on the ship will be that her center of gravity will come no higher than if you have cargo only in the holds?

Q. 117. And what is—

A. And the ship carrying deck cargo will always be more or less tender.

Q. 118. Tender?

A. Yes. Tender. That is, liable to take a list to one side or the other.

Q. 119. Well, now, in your experience as Master of ships, and from what you have observed in other ships with deck cargo, can you form an opinion as to the likelihood of a ship with a deck cargo having a list, based on your actual experience?

A. Yes.

Q. 120. What is that opinion?

A. My opinion of deck cargoes is this: That all ships, when they get deck cargoes on them, will take a list. I think that of all the ships I have seen entering or leaving a port with a wooden deck cargo, at least ninety-five percent of them have had a list either to starboard or port. It is very, very seldom that you see a ship absolutely straight with a deck cargo. That is, a deck cargo carried to capacity. That is a summer deck cargo. A winter deck cargo, which is limited by the height of the bulwarks, is different of course. But the summer deck cargo will always take a list.

Q. 121. This was a summer deck cargo?

A. Yes, sir.

Q. 122. Have you had experience with ships which have had a list of greater than ten degrees?

A. Yes, sir.

Q. 123. What size list have you experienced?

Mr. Thompson: While I don't really think it is admissible, I won't enter any objection.

Mr. Duncan: I think I will ask him to answer that.

Q. 124. What size list have you experienced?

A. I have had as much as twenty degrees on another ship.

Q. 125. Now, Captain, when you have a list of from five to ten degrees on the Nidarholm, do you experience any difficulty in manœuvering her?

A. No.

Q. 126. In your opinion— What is your opinion with regard to her stability and seaworthiness with a five to ten degree list, loaded?

[fol. 143] A. As a matter of fact, the ship is more steady and more stable. She has a greater stability with a five degree list than she has straight?

Q. 127. Why is that?

A. Because— I can't very well express it. But I can draw a diagram of it.

Q. 128. Well, I don't think that is necessary. It is due to the fact that she has a water line which—

A. It's like this. When she is straight it is only her bottom that supports her, her sides are absolutely perpendi-

cular, and the pressure on one side is just the same as the other side. When she lists over part of the perpendicular side becomes partly horizontal, so that her lower side—on the lower side there will be a greater pressure on the lower side than on the higher side, and that pressure will tend to support her. Of course, you can figure the exact area of extra support by drawing a diagram.

Q. 129. After this trip, in which you lost the deck cargo, you went back and got another cargo?

A. Yes.

Q. 130. Did the ship have any list when you were bringing that cargo to Portland?

A. Yes. She had five degrees when we left Murray, and when we got in here and anchored in the Bay she had about seven.

Q. 131. Was that the cargo that was on board down here in the Bay, the other day?

A. Yes, sir.

Q. 132. About a seven degree list?

A. Yes. It was a seven degree list when we anchored here in the Bay. To port.

Q. 133. You were on the bridge when this cargo broke loose?

A. Yes.

Q. 134. You have already said that about every other stanchion was secured by a lashing half way up the stanchion down to a ring bolt in the hatch?

A. Yes, sir.

Q. 135. Did those lashings break when the cargo went overboard?

A. Some of them broke

Q. 136. What proportion of them? How many?

A. There were seven broken and seventeen unbroken.

[fol. 144] Q. 137. Were any of the stanchions unbroken?

A. No. Yes. There was one. One that was stationed right up in the forward end, where there was practically—Well, it wasn't part of the side stanchions at all. It was part of the stanchions preventing the cargo from tumbling forward. All the stanchions in the ends of the deck—against the thwart section of the ship—they remained standing, because there was no pressure on them. But all of the side stanchions broke.

Q. 138. Do you know which broke first; the stanchions or the seven lashings that were broken?

A. No. But from the fact—

Mr. Thompson: I object. He has answered the question, and answered it "No."

Q. 139. Let that stand as it is for a minute, Captain. What happened to the stanchions that broke?

A. They were thrown away.

Q. 140. I mean immediately after they broke. Where were they? On deck, or in the bay?

A. No. They were hanging from the side, in the lashings. Over the side in the lashings.

Q. 141. Did they break in once place? Did each stanchion break in one place?

A. Some broke in one place and others in two places.

Q. 142. Where were the lashings? The seven, out of the twenty-four lashings, that broke? Where were they?

A. They were carried overboard.

Q. 143. I mean in what part of the ship were they?

A. There was one on the port forward deck, and of the other six three were on the starboard side aft and three on the port side aft. So far as I can remember them.

Q. 144. The other seventeen held?

A. They held. Yes, sir.

Q. 145. Now, in your opinion, was the Nidarholm a seaworthy vessel when she was delivered for charter?

A. Yes. Absolutely.

Q. 146. Did she remain such, from then down to the present time?

A. Yes, sir.

Q. 147. What is your opinion of the actions of the Nidarholm on the trip on which she lost her deck load with regard to her seaworthiness?

[fol. 145] A. She was absolutely seaworthy as she could be. She didn't act any different that time from what she had acted before.

Cross-examination.

Mr. Thompson:

X Q. 1. Will you please describe the Nidarholm? First, give her length, breadth, depth of hold, amount of water she draws loaded, and so forth?

A. She is 300 feet long, between her perpendiculars, and her overhang, I think, is 15 feet, but it isn't given on any of our drawings and I have never measured it.

X Q. 2. That would be practically all aft; the overhang?

A. That is all aft.

X Q. 3. Go on?

A. And her breadth is 43.—something; less than five.

X Q. 4. Slightly over forty-three feet?

A. Yes, sir. Her molded depth I can't recollect. If we had Lloyd's Register here I could find it out for you. In ballast she draws generally from eight feet aft up to thirteen; according to the amount of water ballast and bunkers that we have in her. And her draft forward varies from seven feet to eight feet.

X Q. 5. How old is she?

A. She was built in 1920.

X Q. 6. Steel or iron?

A. Steel.

X Q. 7. What is the arrangement of the tanks? The doublebottom?

A. Tanks?

X Q. 8. She is double-bottomed ship, isn't she?

A. Yes.

X Q. 9. What are the arrangements of the tanks there?

A. I don't understand you.

X Q. 10. What is the arrangement? Do they have a starboard and port—

A. Oh. No. All the tanks go from side to side.

X Q. 11. There are no partitions in between?

A. There are partitions but not water-tight.

X Q. 12. Swash-plates?

A. Yes.

X Q. 13. Any tanks in the fore-peak?

A. Yes, sir. One.

X Q. 14. And one in the after peak?

A. Yes, sir.

[fol. 146] X Q. 15. And no deep tank amidships?

A. No.

X Q. 16. Where are the engines? About amidships?

A. Yes, sir.

X Q. 17. And the pilot house?

A. In the forward end of the bridge deck.

X Q. 18. Where is the bridge, with reference to the stem and stern?

A. I should say the pilot house was situated about one-third of the ship's length toward the bow. Two-thirds of the ship's length between the pilot house and the stern. About.

X Q. 19. That is approximately?

A. Yes, sir.

X Q. 20. Where are her bunkers?

A. Her bunkers are on both sides.

X Q. 21. Just forward of the engine room?

A. No. On both sides of the engine room.

X Q. 22. How were they with reference to the bilge of the ship? Up high or down low?

A. They come up as high as the main deck of the ship. Permanent bunkers.

X Q. 23. How far down do they go?

A. Right down to the bilge.

X Q. 24. And how much coal can you take in your permanent bunkers? On each side?

A. We can take 244 tons in the permanent bunkers.

X Q. 25. That is divided equally on each side?

A. No. You can take a little more on the starboard side.

X Q. 26. Well, how much more, Captain?

A. I don't know exactly.

X Q. 27. What is your best estimate or approximation, Captain?

A. Twenty tons more. Perhaps. I have never measured it. That is when they are filled.

X Q. 28. You didn't have any temporary bunkers at that time?

A. No.

X Q. 29. You were using the permanent bunkers?

A. Yes, sir.

X Q. 30. What have you got for bulkheads in the hold?

A. We have one steel bulkhead between number one and number two.

[fol. 147] X Q. 31. A thwartship bulkhead?

A. Yes. And one steel thwartship bulkhead between number four and number three.

X Q. 32. And the rest of it all open?

A. The rest of it is all open. Yes, sir.

X Q. 33. How much power has the ship?

A. She has about 1,100 horsepower.

X Q. 34. 1,100 horse-power?

A. Yes, sir.

X Q. 35. Now, is she what you would call a flat ship or sharp ship?

A. She is what I would call a flat bottom ship.

X Q. 36. She has no keel—outside shoe?

A. She has a bilge keel. One on each side.

X Q. 37. A bilge keel on each side?

A. Yes. But no center keel. She is a flat keel—as I would call it; I don't know what the technical name is—a flat keeled ship, I think. We call it, in Norway, a plate keel. There is no outside center keel.

X Q. 38. Have you any idea, personally, how wide she is on the bottom, from the turn of the bilge, on each side, in the widest place?

A. From bilge to bilge?

X Q. 39. Yes. On the bottom?

A. I haven't that measurement. But her sides are absolutely perpendicular; so her width would be the same right down at the bilge as it is on the line of the main deck. Underneath there her bilges commenced to curve.

X Q. 40. Towards the water—

A. Yes. What the actual width of the flat bottom would be I couldn't say.

X Q. 41. If I understand you correctly, you had never carried pulpwood in that ship before?

A. Not pulpwood. No.

X Q.. 42. And do you remember how high the deck loads were that you carried on either of those cargoes of lumber that you speak of?

A. The first round wood cargo we had, we had about seventeen feet on the forward deck.

X Q. 43. And how much aft?

A. Aft we had about sixteen feet.

X Q. 44. And do you remember how that was secured?

A. It was secured with lashings, and also stanchions out on the side.

[fol. 148] X Q. 45. Practically the same as the pulp wood cargo?

A. No. Those stanchions were arranged entirely different.

X Q. 46. Those are longer poles?

A. Those— Yes. They use part of the cargo for stanchions.

X Q. 47. Now, previous to the trip in question when the cargo was lost, you had carried just one cargo?

A. Under this charter? Yes. The cargo that was lost was the second pulpwood cargo. We had carried one cargo of coal up to Port Alfred under the charter, and one cargo of pulpwood down to Portland.

X Q. 48. You had never been on any other charter for these same people? This same company?

A. No other.

X Q. 49. How were the arrangements for the carrying of the deck cargo on the previous voyage, as compared to this one?

A. It was the same lashings and the same stanchions.

X Q. 50. Same lashings and stanchions?

A. They were left undisturbed. Yes.

X Q. 51. Who furnished the lashings?

A. The wire lashings were furnished by the ship. The employe of the Oxford Paper Company up at Murray asked us if we had anything that could be used for lashings, and we had these wires that we had used for lashings, for lumber cargo previously, and they were turned over to the Oxford Paper Company.

X Q. 52. They were a part of the ship's equipment?

A. Yes, sir.

X Q. 53. Did you personally examine those lashings before they were used?

A. What?

X Q. 54. Did you personally examine those lashings before they were used?

A. No. I didn't personally examine them, but officers who put them up examined them before they put them up.

X Q. 55. The ship's officers?

A. Yes. And they were also examined by the employes of the Oxford Paper Company before they were put up.

X Q. 56. And how did the load on that particular trip compare with the previous trip you had made?

A. Do you mean in quality?

[fol. 149] X Q. 57. No. In quantity?

A. This load was heavier.

X Q. 58. Heavier or bigger?

A. This load was heavier. It was slightly bigger. I should say 30 cords more on this trip than on the other. Slightly bigger.

X Q. 59. Very nearly the same?

A. Yes.

X Q. 60. And the wood, itself, you say was—

A. Heavier.

X Q. 61. Did you have anything to do with the loading of this cargo?

A. No.

X Q. 62. Did you supervise the loading of the cargo?

A. Oh, yes.

X Q. 63. Then you did have something to do with the supervision of it?

A. Yes. The supervision. Not the actual loading.

X Q. 64. And the cargo was loaded as you wanted it loaded?

A. In respect to the draft of the ship.

X Q. 65. And also in respect to the trimming of the ship?

A. The trimming fore and aft.

X Q. 66. And thwartships, too?

A. Yes. If I had seen that there was anything untoward in the loading of the ship, I would have protested.

X Q. 67. And, as a matter of fact, Captain, you were consulted by the stevedore down there as to just where you wanted placed the last few cords that were put on?

A. Yes.

X Q. 68. And you told him just where?

A. Yes, sir.

X Q. 69. If you had wanted a few more forward or aft or port or starboard he would have done it?

A. Yes, sir.

X Q. 70. Weren't you a little nervous about the list the ship was taking before she left the dock?

A. Not a bit. No.

X Q. 71 You are sure of that?

A. Absolutely.

X Q. 72. Did you ever make any talk about changing the amount of water in some of your tanks, just before you left the dock?

A. No.

X Q. 73. You didn't pump in water or let some out just before you left the dock?

A. No. The tanks always have been kept full. As long as we have been in this trade. And previous to our starting loading on deck cargo it has always been the custom and [fol. 150] it was done at that time and the first time and the other two times—to see that all the tanks were sounded to see that they were full and pressure put on them to insure that they were full.

X Q. 74. Now, didn't you, just shortly before leaving the dock the day of the accident, didn't you pump some water into some of your tanks, or didn't you have some pumped out?

A. Pumped out? No.

X Q. 75. How were your tanks just shortly before you left the dock on this particular trip?

A. Why, they were distributed.

X Q. 76. How?

A. About evenly distributed.

X Q. How near? You say "about"?

A. There wasn't ten tons difference.

X Q. 78. Did you have ten tons more in the starboard side than the port?

A. She might have.

X Q. 79. You don't know?

A. No. That starboard side is a little bit bigger than the port side, and when her tanks are filled there would be more on the starboard side than the port.

X Q. 80. And of course what you say about the tanks being filled, is simply dependent upon what some member of your crew told you. You didn't personally sound the tanks?

A. No.

X Q. 81. And there is nothing on the bridge of the ship that tells you that?

A. No.

X Q. 82. You would have to rely on some member of your crew?

A. Yes, sir.

X Q. 83. On this question of this five degree list; are you pretty sure about that? When you left the dock?

A. Yes. I am sure of that.

X Q. 84. To starboard?

A. Yes, sir.

X Q. 85. The water, of course, was perfectly calm. The sea doesn't enter into the question at all?

A. Alongside the dock there was no sea.

X Q. 86. And out in the channel there was no sea? The sea doesn't enter into it, does it?

A. There were no waves.

X Q. 87. It was perfectly smooth and calm?

A. It was smooth. It was not calm, because there was a pretty strong breeze blowing. But there were no waves. [fol. 151] X Q. 88. It was morning when you left, wasn't it?

A. Eleven o'clock.

X Q. 89. During the day that you left, who was in the pilot house when you were going down?

A. There was the pilot and myself and the man at the wheel.

X Q. 90. And where were the rest of your crew? Was anybody else on deck?

A. They were— Just after we backed away from the dock they went in to their dinner.

X Q. 91. There was nobody forward or aft?

A. There was nobody forward on top of the deck cargo; forward or aft.

X Q. 92. So you three were really the only men on the deck at that time?

A. Yes. So that we could see the view of the whole cargo. There were some of the officers standing on the midships deck.

X Q. 93. That is aft of the bridge?

A. Abaft the bridge.

X Q. 94. There weren't in a position where they could see what happened forward when the thing first took place?

A. No.

X Q. 95. You, yourself, and the first mate and the pilot?

A. No. Not the first mate. The man at the wheel. Quartermaster.

X Q. 96. Quartermaster?

A. You call him quartermaster. One of the sailors.

X Q. 97. An able seaman?

A. Yes, sir.

X Q. 98. When you started that morning with that five degree starboard list, did you presume the ship would maintain that list right through to Portland?

A. No.

X Q. 99. Did you think it would increase?

A. No.

X Q. 100. What did you presume?

A. I presumed she would act the same way as she had acted on the other voyage; namely, straighten up when I put the helm hard aport to turn her around, and then take a small list to port.

X Q. 101. When you put your wheel hard down, either one way or the other, the ship would go down according to the way you put your helm? According to the way you put your rudder?

A. She would either straighten up or heel over more.

[fol. 152] X Q. 102. She had a starboard list when you started out, and if you put your wheel to port that would be starboard rudder? Port helm starboard rudder?

A. No. Port helm would be a port helm. The blade of the rudder would be swinging to port——

X Q. 103. If you roll your steering-wheel to the right, your vessel's head is going to starboard?

A. Yes, sir.

X Q. 104. And what I am trying to get at: If you put your wheel to the right—a port wheel as we call it—would that increase that starboard list until you straightened her out again? Do you understand me, Captain?

A. I understand, I guess. No. That would straighten her up immediately, and——

X Q. 105. And have a tendency to throw her the other way?

A. Yes, sir.

X Q. 106. Assuming that you put your rudder hard over to port or starboard, which would cause the vessel to list one way or the other, would she list greater while the wheel was over or while the wheel was amidships? During that very brief interval while the wheel is hard over would it increase the list——

A. During the time that the ship was actually swinging to her wheel she would straighten up.

X Q. 107. Then when would she list?

A. She would then—when she was straightened up—if she continued to swing she would sag over to port. That is, theoretically. If she was steadied, after having made just a little bit of a swing, she would come back again to starboard. But the actual swinging of the ship would straighten the ship up.

X Q. 108. Now, Captain, assuming your ship on a starboard list of five degrees when you started out, and you put your rudder hard over to make it turn in the channel or harbor, and then right up again, how much time would intervene from the time she would go from five degrees to starboard over to five degrees to port?

A. That is a hard question to answer. As a matter of fact, to my best recollection, she came upright very, very slowly, and she went over to port, very, very slowly; and I should say, without wanting to swear to it, that a matter of about five minutes intervened between the time when [fol. 153] she actually had five degrees to starboard until she got over to five degrees to port.

X Q. 109. And these five degrees are assumptions on your part? Estimates?

A. No. Actual observations.

X Q. 110. From what?

A. From a clinometer.

X Q. 111. Do you remember just before you loaded this cargo asking the stevedore to put on a certain number of cords of wood on the port side? To try to off-set the starboard list?

A. No.

X Q. 112. Do you remember that you finished loading about four o'clock in the morning?

A. Yes, sir.

X Q. 113. Don't you remember the stevedore coming to you about half past three or quarter to four that morning, and asking you about the list of the ship?

A. Yes. I remember it perfectly.

X Q. 114. And did you not stop him, and then ask him to continue loading again?

A. Yes, sir.

X Q. 115. And didn't you ask him to put so many cords on the port side?

A. Yes, sir.

X Q. 116. And the purpose of doing that was to offset the list of the ship to starboard?

A. Sure. But——

X Q. 117. Just a minute. Perhaps Mr. Duncan can get that out, if you want to elaborate on it. You have already answered the question. Now the depth of the channel which you gave, down there,—that is called St. Anne's, I think——

A. No. That is the whole bay. St. Anne's Bay.

X Q. 118. What do you call this channel?

A. I don't think there is any name to it. Just the narrows.

X Q. 118. Call it the channel or narrows going from Murray to sea?

A. Yes. I believe both inside and outside the narrows are called St. Anne's Bay. I think.

Mr. Duncan: I believe that is true.

X Q. 119. It is safe to call it the narrows or channel leading from Murray to the ocean?

A. Yes. The narrows or channel.

X Q. 120. The depth of water in the channel is twenty-four feet?

A. Yes. That is what I have been told by the pilots.

X Q. 121. At low water?

A. No. At high water.

[fol. 154] X Q. 122. What is the rise and fall of the tide there, if you know?

A. It varies with the phases of the moon, but for ordinary purposes I think they call it three feet.

X Q. 123. Do you know how much water you had under you when you went over that channel?

A. No.

X Q. 124. What is your best judgment?

A. Assuming that——

X Q. 125. Well, let's not assume, Captain?

A. Well, if there was nearly twenty-four feet of water at that time, at the time we crossed the bar, we wouldn't have more than about a foot and a half of water under our deepest part.

X Q. 126. Did you have a tow-boat?

A. No. There are no tow boats up there.

X Q. 127. Was the wheel stirring up the mud?

A. I didn't notice.

X Q. 128. You didn't feel the ship hold back any?

A. No we didn't feel the ship strike or touch the bottom.

X Q. 129. And you don't think it did?

A. No. I don't think so. At least we never felt it. Of course there was a little bit of excitement going on when the cargo dropped overboard. But I am pretty sure that we would have noticed if she had touched bottom, in any case.

X Q. 130. Getting back to that talk with the stevedore about quarter of four that morning, didn't you make any talk about the water in the tank at that time?

A. No.

X Q. 131. You are pretty sure about that?

A. I am sure I didn't say a word to the stevedore about that.

X Q. 132. Did you make any talk with the pilot about it?

A. No.

X Q. 133. Now, getting down to the time of the lost pulpwood, the first thing you knew about it you heard a snap?

A. Yes. A crack. A loud crack.

X Q. 134. You describe it as a snap, in your log?

A. No. As a crack.

X Q. 135. Well, call it whatever you want to. It didn't disturb you any? That particular thing?

A. No. I didn't think of it. Not——

[fol. 155] X Q. 136. How long after hearing that snap or crack before you saw the wood go overboard?

A. About half a minute or so. As soon as I heard it, I looked over the windshield, and right after that I saw the stanchion give way and the cargo go over.

X Q. 137. Could you see the stanchion, yourself?

A. Yes, sir.

X Q. 138. The lashings came from midway of the stanchions down to the ringbolt of the deck?

A. Yes, sir.

X Q. 139. And there is a piece that runs around the outside of the stanchion, isn't there? Fore and aft?

A. No lashing.

X Q. 140. Isn't there a wire from the bow to the stern, outside of your stanchions?

A. No.

X Q. 141. And the only support the stanchions have are just these wires that you have spoken of?

A. Yes.

X Q. 142. And those stanchions are about twenty feet apart?

A. No. Six to eight feet.

X Q. 143. And the wire ropes, in your opinion, Captain, were necessary to support those stanchions?

A. I was surprised, and I asked him why they wanted it.

X Q. 144. What surprised you?

A. Because it isn't the way we lash deck cargoes at all on the other side. The way we lash deck cargoes——

X Q. 145. Well, we don't care about that. I was wondering what surprised you?

A. I wasn't used to having that kind of lashings.

X Q. 146. I asked you if it wasn't necessary to lash the stanchions in order for them to hold the deck cargo?

A. Afterwards, when I heard the explanation of those lashings, of course, I could see that it was necessary to have some kind of lashing.

X Q. 147. What is the purpose of the lashing, as you understand it now?

A. To prevent the stanchions from tipping over. You see the stanchions are about twenty feet long. Of those twenty feet, only three feet are below he rail.

X Q. 148. You have got a rail running around your ship?

A. Yes. A bulwark.

X Q. 149. A bulwark, or rail?

A. Bulwark.

[fol. 156] X Q. 150. She is a well-deck ship?

A. Yes.

X Q. 151. Did you say "yes"?

A. Yes. Only three feet are below the rail. Seventeen feet are above the rail.

X Q. 152. Will that lashing run up about ten feet on that stanchion?

A. Yes, sir.

X Q. 153. And if you didn't have those lashings, those stanchions would sag out and allow the cargo to go out over the rail?

A. Yes, sir.

X Q. 154. And if one of those lashings did break and permit the stanchions to go out over the rail, as we have just

said, that would of course increase the strain on that particular stanchion?

A. Yes, sir.

X Q. 155. And after some of that cargo started to go over the rail, of course the other would be likely to follow? If one stanchion broke?

A. Yes. When once that cargo starts to go it is bound to go all, too. Because it goes like peas out of a bag.

X Q. 156. The minute the cargo started to go off that port side, that increases the uneveness of the ship and she went the other way?

A. Yes.

X Q. 157. How far did she list the other way?

A. I couldn't say, but pretty far.

X Q. 158. Did that scare you?

A. No. It didn't scare me, but I— She went so far over the stanchions broke.

X Q. 159. You expected they would?

A. I knew they were going to.

X Q. 160. Didn't your man at the wheel run out of the pilot house?

A. I think he did run to the door, to have a look over to see what was going on.

X Q. 161. Didn't you run out?

A. I was outside of the pilothouse when that happened.

X Q. 162. Where was the pilot?

A. The pilot was also outside.

X Q. 163. Was the vessel on a straight course at the time the cargo first started to go?

A. We had just straightened up. We had been swinging and had just straightened up.

[fol. 157] X Q. 164. Then, according to your previous theory that you have testified to, you had just been swinging so that the vessel must have been about on even keel, and when you straightened up she started to list over? I suppose——

A. I can't tell you exactly; you see, with so little water, of course, underneath the keel, the ship doesn't steer so well as when she is in deep water, and that means that the action of the rudder must be greater. We have got to give her more wheel in order to have the same effect on the ship's steering, and of course that makes an unruly rudder. It is never steady.

X Q. 165. If I understand you correctly, when your vessel had a list either to starboard or port, and you put your wheel the other way hard, she would righten up temporarily and either go back the same way or flop the other way?

A. Yes, sir.

X Q. 166. Now, just before this cargo went overboard, you had just come back to amidships rudder?

A. What?

X Q. 166. I say, just before this cargo went overboard, you had just come back to amidships rudder?

A. Let me straighten this out. (Takes piece of paper and pencil.) This is a very imperfect sketch of the channel. These dots represent buoys. The shallow water is over here. And down here. We had come down here and we had to swing around this buoy to get into that position there (indicating on sketch). That is, we were swinging on the port helm; swinging on the port helm with a list to port would tend to give it a little more list. Now the swinging wasn't very much. We had just come around that buoy and was straightening up for that course, and it was just as we had straightened up here that this commenced to happen. You understand the distance here (indicating) was very, very short. And when we were here (indicating) the cargo commenced to go, and during the time it took for the cargo to roll off I suppose we came up as far as here (indicating).

X Q. 167. Then that course required you to do considerable steering?

A. Yes, sir.

X Q. 168.: You were moving the rudder one way or the [fol. 158] other practically all the time? Shifting the rudder all the time?

A. Yes, sir.

X Q. 169. And just prior to this last shift you made you must have been on the starboard list?

A. No. We kept the port list that way. She came to port immediately after turning around, and she maintained that port list all this time, and when we got near the—into the shallow water here—she just about doubled her list from five to ten degrees; and just as we were right out here (indicating) this thing happened.

X Q. 170. She remained on the port list, and as she got into shallow water she increased that list?

A. Yes, sir.

X Q. 171. And this snapping or cracking that you heard was when she was on this increased list?

A. Yes, sir.

X Q. 172. On the port side?

A. Yes, sir.

X Q. 173. And you think it was about half a minute from the time you heard that sound until the cargo started?

A. Until I noticed it. About that. I didn't stand with my watch in my hand and look at things like that. Anyone just judges those things.

X Q. 174. Captain, did you at any time on this ship have a lashing about from the mast going right across thwartships of the ship?

A. Yes, sir.

X Q. 175. Did you have that on the first trip?

A. No. Not on the first trip.

X Q. 176. Did you have it on the second trip?

A. No.

X Q. 177. But you did have it——

A. We had it on these last two trips.

X Q. 178. Do you remember about the Oxford Paper Company wanting you to put that on the second trip, and you objected to it?

A. No. I didn't object to it at all.

X Q. 179. Do you remember their wanting to put it on?

A. No. They didn't speak to me about it on the second trip. They said that usually ships had such a lashing.

X Q. 180. Well, then they did call that to your attention?

A. Yes.

[fol. 159] X Q. 181. Do you know why that wasn't put on this second trip?

A. It wasn't put on because I didn't consider it necessary. I didn't consider that it would do any good.

X Q. 182. That is what you told them?

A. Yes.

X Q. 183. But they did offer to put it on? They wanted to put it on?

A. They didn't want me to put it on. They said it was usual.

X Q. 184. And you said you didn't think it was necessary?

A. Yes, sir. I didn't think it was necessary.

X Q. 185. But you did put it on the third trip?

A. Yes, sir. We did put it on the third trip.

X Q. 186. Did you notify, or did anybody in your behalf notify, the Oxford Paper Company that you intended to hold a survey on your ship down here, Captain?

A. Here in Portland?

X Q. 187. Yes.

A. I think I mentioned to Mr. Young that we were going to have Lloyd's man to survey the damage.

X Q. 188. But you didn't notify them of the exact time or where it was to take place, did you?

A. No.

X Q. 189. After the damage had been done you returned to the harbor; and did you make a survey?

A. Yes. We had a survey.

X Q. 190. And did you at that time conclude what the cause of the pulpwood's going over was?

A. No. We didn't come to any definite conclusion. But I told Mr. Harvey and the men up there that my conclusion was that the cause of the cargo going over was because the stanchion broke.

X Q. 191. Didn't you tell them that the lashings broke?

A. No.

X Q. 192. But you did make a report and signed it as to what caused the cargo to go over?

A. We did draw up a report finding—or estimating—the amount of the cargo; and just what the wording of that survey report was I don't remember.

2 X Q. 193. Have you got one here?

A. I think I have a copy of it, yes, sir; on board.

X Q. 194. And that report was your best judgment at the time you signed it, of course?

A. So far as the amount of the cargo.

X Q. 195. And also as to whatever that report contained?

A. Yes, sir.

[fol. 160] Redirect examination.

Mr. Duncan:

Q. 148. Did I understand you to say, Captain, that the cargo with the second load of pulpwood was heavier than the first cargo?

A. Yes.

Q. 149. Why was that? Was it simply due to the fact that there was more of it?

A. No. The cargo itself was very much heavier.

Q. 150. Do you know why?

A. I can only think that the second cargo that we got had remained longer in the water that the first.

Q. 151. Now, the third trip you made; the trip after the loss; was there any difference in the stanchions that were put up by the Oxford Paper Company?

A. They were stronger stanchions. Yes. Heavier.

Q. 152. What was this lashing which Mr. Thompson was asking you about, which was put up the third time and wasn't put up before? Describe that.

A. The lashing that wasn't on the first or second time?

Q. 153. Yes?

A. That consisted of a wire that was stretched between the mast and the stanchion out on the side. The wire was secured to the stanchion out on the side with a rope. And also to the mast with a rope.

Q. 154. Was that in addition to the wires that ran down to the ringbolts?

A. Yes. In addition to it.

Q. 155. Was this wire attached to the stanchions as they went along.

A. No. Only one.

Q. 156. Which stanchion was it?

A. That was the stanchion that was just abreast of the mast.

Q. 157. So that additional lashing consisted of a single wire which ran from the stanchion opposite the mast, on each side?

A. Yes, sir.

Q. 158. Was the deck cargo stowed the same way the third trip as it was the second trip?

A. No. On the first two trips the logs were stowed longitudinally, forward and aft, with the exception, of course, [fol. 161] of the two tiers out to the sides. On the third and fourth trip all of the deck cargo was stowed thwartships. All of the logs were stowed thwartships.

Q. 159. Why was that change made, Captain?

A. Because I considered that the cargo would lay more steady against the ship's movements. These logs being

round, very likely when the ship begins to roll in the sea, well, they will roll a little; but being thwartships, they could only slide, and having a longer way to slide they lie more steady.

Q. 160. Now the first thing you heard when you got down to the narrows, in connection with the loss, was a loud crack?

A. Yes,

Q. 161. Did you form an opinion at that time, or did you know, whether that was the crack of breaking lashings or breaking stanchions?

Mr. Thompson: I object. The witness has already testified that he couldn't tell.

A. It sounded as if something woody was breaking up.

Q. 162. Do you know how much lumber went overboard? Did you figure that out when we got back to port?

A. We measured when we got back and got the deck cargo straightened out and leveled off—we measured by the space that the lost cargo had occupied; and we figured out the number of cubic feet that the lost cargo had occupied in stowage. And that number of cubic feet was put down in the survey report that was held to determine the loss of cargo.

Q. 163. Captain, you have testified on cross-examination that you told the stevedore about three o'clock or so in the morning of the day you left, to put some more cargo on the port side?

A. Yes, sir.

Q. 164. Will you go into that a little further? What happened?

A. When I come up—I had told them to call me about that time—and when I come up they were dumping the logs from the chutes on to the deck. Now the chutes are so short that when the deck cargo is nearly finished there is only a little drop from the end of the chutes down to the cargo. So that all the cargo that drops off the chutes [fol. 162] drops on the inside of the ship; in this case, where she was with the starboard side to the dock, it drops to the starboard side. And that is the condition I found when I came up; that there were big heaps of cargo on the starboard side, much more cargo on the starboard side than on the port side, giving the ship a list inwards.

Q. 165. How must list?

A. Oh, it was over ten degrees. Well over ten. So then I told them to stop loading until he had shifted all this lot of big piles so that the deck cargo was level. That is, so that it was just as high on the port side as on the starboard side.

Q. 166. What list did you have then? Five degrees?

A. When they had the deck cargo leveled off, she had five degrees list.

Q. 167. Now, down in this narrows where the cargo went overboard; do you know whether there are any currents down there, or not? Cross rips?

A. Yes. I made inquiries about that afterwards.

Mr. Thompson: I don't think he ought to testify about his inquiries, but about what he knows.

Q. 168. What do you know of your own knowledge about the current down there?

A. I know that according to what I hear——

Q. 169. No. You can't testify as to what you heard.

A. I think——

Q. 170. No. You can't think that.

A. I can't think it. Well, then, I know it.

Mr. Thompson: You win, Captain, go to it.

A. If you want to know how I got my knowledge, I can tell you that. I know it now. I didn't know it then. But I know it now. That at one stage of the tide, especially when the tide is turning, a cross-current is liable to form. At the time when we went out—I know this is true—that just after high water, when the water begins to run out, it starts to run out on one side of the channel before it starts on the other side. I noticed then that the spar buoys—sticks of wood sticking up in the water—were leaning outwards; that is, the current was setting them out on the starboard side of the channel; that is on the starboard side [fol. 163] of the ship going out. And they were setting up and down on the port side. That is caused— That means that there is a bigger current on that side than on the port side. A current on that side and slack water on the other side. The water is still.

Q. 171. What would be the effect on your ship going through there loaded with wood?

A. The effect of such a current can be practically anything. If such a cross-current gets hold of your ship and gets a grip on her it will throw her out of course and she may heel over; it may make her heel over.

Recross-examination.

Mr. Thompson:

X Q. 196. Then, Captain, on that subject, your ship was in such a condition that the list could be materially increased simply by the effects of the current in that channel?

A. It could be increased.

X Q. 197. Well, it was increased, in this case, you say?

A. No, I can't say it actually did increase the list. But it could increase it.

X Q. 198. I want to know what it did do.

A. Well, I can't say that.

X Q. 199. You don't think it did, in this case, if I understand you?

A. It may have done it.

X Q. 200. Well, I am asking you if you think it did, Captain?

A. In this case I wouldn't swear that it did, but I think it could very well do it.

X Q. 201. Now, getting back to this other question; when you came out on deck after the stevedore called you, between three and four o'clock in the morning, the ship had a very rank list to starboard?

A. Over ten degrees.

X Q. 202. How much more? How much over?

A. I can't say how much.

X Q. 203. Fifteen degrees?

A. No. About ten to twelve degrees to starboard.

X Q. 204. Her stanchions held all right then?

A. Yes, sir.

X Q. 205. Do you remember after your first trip talking with Mr. Young of the Oxford Paper Company something about if you had more coal it would make your ship [fol. 164] steadier?

A. Yes, sir.

X Q. 206. And he did furnish you with more coal?

A. Yes, sir.

X Q. 207. So you did experience some crankiness of your ship on the first voyage?

A. No. I didn't ask him for coal to make the ship more steady, but I asked him for more coal to get an increased weight of ballast in her bottom so we might take a little more deck cargo.

X Q. 208. Then you wouldn't want to take more deck cargo than you had the first trip without more weight to steady her down in the hold? Is that right?

A. No. I wouldn't. If I had more weight to the ballast I could figure out how much more weight we could take of deck cargo.

X Q. 209. But, to answer my question, without more weight in the holds or the lower parts of the vessel, you wouldn't want to take more deck cargo than you had the first trip. Is that right?

A. No.

X Q. 210. I say, is that right?

A. That is right. Yes.

Redirect examination.

Mr. Duncan:

Q. 172. Did you mean the first trip you made with this charter, or the trip the accident occurred?

A. The previous trip. On the previous trip.

Q. 173. You mean the trip the loss was sustained?

A. The trip previous to the loss.

Q. 174. The trip previous to the loss?

A. Yes. We had less bunkers. That means less weight in her bottom, than we had the second trip.

Q. 175. The trip when you had the loss you had more weight in her bunkers?

A. Yes. And I think that is why we put in the additional thirty cords.

Q. 176. When was this conversation with Mr. Young? Between the first and second trip?

A. That was when we dischagred our first cargo. Yes.

(Witness excused.)

[fol. 165] Leif Christophersen, having been duly sworn as a witness, deposed and said as follows:

Direct examination.

Mr. Duncan:

Q. 1. What is your full name?
A. Leif Christophersen.
Q. 2. You are the first officer of the Nidarholm?
A. Yes.
Q. 3. Where do you live?
A. Well, aboard the ship. My home is Krager.
Q. 4. Well, in Norway?
A. Yes, sir.
Q. 5. How long have you been first officer of the Nidarholm?
A. Two years.
Q. 6. How long have you been at sea?
A. Sixteen years.
Q. 7. What have you got, in the way of license?
A. Master's.
Q. 8. How long have you had that?
A. Four years.
Q. 9. What kind of ships have you been on for these sixteen years?
A. Oh, all kinds. From sailing vessels to steamers.
Q. 10. Have you had any experience on steam vessels carrying deck loads?
A. Yes, sir.
Q. 11. What does that experience consist of?
A. Round wood, pit wood—props; and sawn lumber, and big lumber, pitch pine; but mostly my experience has been in carrying pit wood; props.
Q. 12. Pit props?
A. Yes. I carried pit props from the Baltic and from the White Sea, and from Newfoundland.
Q. 13. To where?
A. To England, and to various places.
Q. 14. What has been your experience with reference to carrying deck loads with regard to any list the vessel had or may have?
A. Well, all the ships I have been in, carrying a deck load— I mean a full, summer deck load—the ship has had a list one way or another. It varies according to the quality of the cargo and the construction of the ship.

Q. 15. You were on the Nidarholm when she went into Murray to get the first cargo under this charter?

A. Yes.

Q. 16. Was she, in your opinion, seaworthy at that time?

A. Yes.

[fol. 166] Q. 17. Did she have a list when she went up there to get the cargo? Did she have a list going in to Murray?

A. When she is light she always has about one or two degrees list to port.

Q. 18. Now, during the loading at Murray, what were your duties?

A. Well, to superintend the loading.

Q. 19. Did you superintend the loading?

A. Yes. In a general way.

Q. 20. Did you have any talk with any representative of the Oxford Paper Company in regard to the method of loading?

A. The first time. Yes.

Q. 21. What was it?

Mr. Thompson: Who was the representative?

A. McKnight; and Mr. McDonald, the stevedore.

Q. 22. What was it?

Mr. Thompson: I object to any conversation with the longshoremen.

A. They wasn't longshoremen. They are employes of the Oxford Paper Company. One is the chief engineer of the Oxford Paper Company, and one is the stevedore boss.

Mr. Thompson: I object, because I don't think it is admissible; but go ahead.

Mr. Duncan: You object on what grounds?

Mr. Thompson: That the stevedore or longshoreman is not a proper one to make comments against their principals.

Q. 23. Who were these people, again?

A. McKnight is the chief engineer of the Oxford Paper Company. And Mr. McDonald.

Q. 24. What was your conversation?

A. I asked them if that was the usual way of storing their cargo up there, and they said it was. It was the way they always used to use on all steamers. And I asked

them also if they found it safe to load cargo that way; and they said they never had any accidents and it was the most convenient way for loading and unloading the vessel.

Q. 25. Now, you have heard the talk about that extra lashing that went from the mast to one stanchion on each side opposite the mast?

A. I never paid any attention to it.

[fol. 167] Q. 26. I say, you heard the Captain testify in regard to that?

A. Yes.

Q. 27. And that was put on the third trip for the first time?

A. Yes, sir.

Q. 28. What is your opinion as to the value of that lashing?

A. Nil.

Q. 29. Wait a minute:—the value of the lashing as to securing the cargo?

A. It has absolutely none.

Q. 30. Why?

A. Except for that narrow section right up at the mast, and there the cargo is secured anyway by the rigging. The stays. So that the value of that lashing is practically none.

Q. 31. When the ship was ready to leave the dock she had a list of five degrees to starboard?

A. Yes, sir.

Q. 32. Where were you at the time she left the dock?

A. I was on the forecastle head letting go the moorings, and afterwards superintending clearing up the ropes and moorings, and similar duties, you know.

Q. 33. How long did you stay on the forecastle head?

A. I stayed there until the ship was on the point of turning. When the ship started to go ahead we finished on the forecastle head, and I left the forecastle head to look after the windlass, etc., and I went to my room to set the watches right away.

Q. 34. And the second mate had the first watch?

A. Yes, sir.

Q. 35. Did you notice anything in regard to her list or change in her list before you went below?

A. Yes. I noticed that the ship changed her list when she started coming ahead.

Q. 36. When you went— After you went below, what was the next thing you noticed in regard to the conduct of the ship?

A. The next thing I noticed was that I noticed a slight increase of the list, but I didn't pay any attention to it. In fact, I paid so little attention to it that I washed and changed and put on my pajamas and was in the act of going to bed. In fact I was sitting on the side of my bunk, and then the ship took a sudden lurch and hove over to the starbo*a*d side.

Q. 37. Did you hear any noise at that time, or before that time?

[fol. 168] A. No. My cabin is situated in the after part so I didn't hear anything before this cargo started. And I was out on the deck and—as soon as this ship took this lurch over to the starboard I jumped up and climbed out on the deck and saw the deck cargo just sailing right over the side, and the ship flopped back again and flung all the cargo on the port side of the after deck over the side.

Q. 38. Did you examine the lashings after the cargo had gone overboard?

A. Yes, sir.

Q. 39. What did you find, in regard to that?

A. I found most of them intact.

Q. 40. How many?

A. Seventeen intact and seven broken.

Q. 41. How about the stanchions?

A. The stanchions—I didn't count them—but several of the stanchions were simply hanging in the lashings. Some of them were broken right above the rail and some in two places above the rail and above the lashing.

Q. 42. How many stanchions were there against the bulwarks?

A. I didn't count the stanchions, but I think there were somewhere—well, let's see—we had six lashings on each side of each deck. I believe there must have been something like twenty stanchions on each side. Eighteen to twenty.

Q. 43. You mean making forty altogether?

A. On each side of each deck.

Q. 44. So it would make eighty altogether?

A. I can't testify to that, because I didn't count them. But I believe there was something like a dozen and a half stanchions on each side of each deck.

Q. 45. Well, it would be four times that?

A. Yes, sir.

Q. 46. Were any of them unbroken after the cargo had gone overboard?

A. No.

Q. 47. Any time at Murray, before the ship left the dock, do you know whether or not the water tank was full?

A. To my knowledge they were full, and I had inquired of the chief engineer if the tanks had been under pressure, and they had. If nothing in the nature of an accident happens, the tanks are always full, because they are not pumped out unless by orders from deck; from one of the officers or the captain.

[fol. 169] Cross-examination.

Mr. Thompson:

X Q. 1. You never carried any pulpwood at all, before?

A. No. I never carried any of that length.

X Q. 2. At the end of the first trip, after the cargo of pulpwood had been discharged here at Portland—the trip prior to the loss—were the stanchions left standing?

A. Yes, sir.

X Q. 3. And you went back to Murray with your deck clear but the stanchions still standing in their regular position?

A. Yes, sir.

X Q. 4. And, going back, from time to time, you would see those, of course?

A. Yes, sir.

X Q. 5. Looking right at them, that were forward, while you were on the bridge?

A. Yes.

X Q. 6. And you never found any fault with them?

A. No. Not by the looks of them.

X Q. 7. They looked all right?

A. Yes. I didn't examine each stanchion. There may have been breakage in any of them. I didn't make an examination of them each trip.

X Q. 8. So far as you observed, however, they were all right?

A. Yes, sir.

X Q. 9. Did you ever tell these men you talked with, or anybody else representing the Oxford Paper Company up there, that they should put heavier stanchions in?

A. I asked them, when they started loading the first time, if this was the way they usually loaded——

X Q. 10. Well, you testified to that. That was the only conversation you had?

A. Yes. I didn't request them to put in heavier stanchions, because I was under the impression that the Oxford Paper Company undertook all the loading and unloading of the ship and it was supervised by the Oxford Paper Company's officials, and all gear supplied—not gear, but stanchions and lashings—should be supplied by the Oxford Paper Company.

X Q. 11. But you knew, as a matter of fact, that the ship did supply the lashings?

A. It did, at the request of the Oxford Paper Company.

[fol. 170] X Q. 12. And those lashings and stanchions looked all right to you?

A. Yes, sir

X Q. 13. And they did, as a matter of fact, hold the cargo in all right on the first trip?

A. Yes, sir.

X Q. 14. Did your ship list the first trip?

A. Yes, sir.

X Q. 15. Just as much as she did the second?

A. She had just as much list when she left the quay, but not so much list as at the time the cargo——

X Q. 16. Well, I mean at no time prior to the time the cargo was lost did you have as much list as at the time of the loss?

A. Yes. While loading.

X Q. 17. Loading for this second trip?

A. Yes.

X Q. 18. What was the maximum list that you had while loading for this second trip?

A. I guess somewhere around eight to twelve degrees. I didn't look at the clinometer.

X Q. 19. Were you lying down at the time this cargo first went overboard?

A. I was sitting down in my bunk. I was on the point of turning in.

X Q. 20. Which side of the boat did you sleep in?

A. Starboard side.

X Q. 21. And did she list to port?

A. Yes, sir.

X Q. 22. Do you know how many degrees list the vessel took prior to the time the first pulpwood went overboard?

A. I looked at the clinometer prior to leaving the quay and see that she had about a five degree list to starboard.

X Q. 23. If you looked at the clinometer why don't you know just how many degrees she had?

A. What?

X Q. 24. If you looked at the clinometer why don't you know just how many degrees she had?

A. Just?

X Q. 25. Exactly?

A. I say about five degrees. That means half a degree, more or less.

X Q. 26. Were you on deck that morning early just as they were completing the loading?

A. Yes, sir.

X Q. 27. And did you see the captain and the stevedore talking?

A. Yes, sir.

[fol. 171] X Q. 28. And did they, after talking, continue to load?

A. They dumped about twenty cords after that.

X Q. 29. Which side did they put them on?

A. They leveled it off. All the cargo was dumped on to the starboard side.

X Q. 30. Did that change the list any?

A. Straightened her up to about five degrees. When I came out in the morning she had more than five degrees.

X Q. 31. What time in the morning?

A. Around three o'clock.

X Q. 32. Were they through loading then?

A. No. Just completing.

X Q. 33. At any time between after the loading and the time you left the dock was the list more or less than five degrees?

A. After completing the loading the list was never more than five degrees.

X Q. 34. She stayed right on five degrees?

A. Yes, sir.

X Q. 35. Was any change made in the water tanks from that time up to the time of the disaster?

A. No.

X Q. 36. You are sure of that?

A. Yes.

X Q. 37. Could you tell from your room whether or not the engineer had changed them at all?

A. No.

X Q. 38. The engineer would be the man to pump out the tank?

A. Yes. But he didn't do it.

X Q. 39. But he would be the man to do it?

A. Yes.

X Q. 40. Now, as your ship continued down the harbor toward the channel, this list to port gradually increased?

A. Yes. But that didn't start until I got into my cabin. And in the room you don't notice very much whether the floor is sloping five or seven or eight degrees.

X Q. 41. But you did testify——

A. I said I felt the list increasing; but how much I could not say.

X Q. 42. You talked about these lashings broken. In what parts of the ship did you find the broken lashings?

A. The broken lashings were scattered all around; I believe most of them on the after deck.

[fol. 172] X Q. 43. How many on the forward deck?

A. I believe two on the starboard side.

X Q. 44. You heard the captain testify?

A. Yes.

X Q. 45. Didn't the captain testify that one of the lashings on the port side forward was broken. Do you remember now whether one of the lashings on the port side forward was broken?

A. Yes. I remember the captain testified to it.

X Q. 46. Do you remember, personally——

A. That one of the lashings forward on the port side was broken?

X Q. 47. Yes?

A. No.

X Q. 48. On the trip down, previous, did the ship list first to starboard and then to port all the way down?

A. Yes.

X Q. 49. Rocked back and forth?

A. She had a starboard list when we left the quay and took a port list after turning around and kept it all the way.

X Q. 50. What was the greatest list she had on the previous trip?

A. With the pressure of wind she probably had six to seven degrees.

X Q. 51. But at no time did she have ten degrees?

A. She may have had, on my watch below; but I never saw it.

X Q. 52. So that list that she had at the time the cargo went overboard was the heaviest list the ship took except that time at the dock?

A. That is right.

Redirect examination.

Mr. Duncan:

Q. 48. On the next trip, after you had the loss, what was the lashings? What did you use for lashings?

A. Chains supplied by the Oxford Paper Company.

Q. 49. The Oxford Paper Company furnished you with chains?

A. Yes, sir.

Q. 50 Where are those chains now?

A. On the ship.

Q. 51. All the lashings?

A. They intended to put all chain lashings but they didn't get there. So we put part chain lashing and the rest the other lashing.

[fol. 173] Q. 52. Is there any difference between the stanchions which were used on the trip when the loss occurred and the stanchions on the next trip? Used on the next trip?

A. Yes. About one hundred percent difference.

Q. 53. What was it?

A. About twice as big.

Q. 54. What kind of stanchions were in use when the cargo broke loose?

A. I believe them to be balsam spruce. I am not acquainted with the varieties of woods——

Q. 55. Well, all right. If you don't know, say so.

A. Well, I know then. Balsam spruce. And it is considered a very frail——

Q. 56. No. I think we will have to cut that out. We will leave it at "balsam spruce"?

A. Yes.

Recross-examination.

Mr. Thompson:

X Q. 53. What list did you expect the ship was going to take in this voyage in question when the disaster occurred?

A. Well, with a deck cargo, you can expect anything. By experience I expected——

X Q. 54. No. I am talking about this particular cargo?

A. Well, by experience you can expect anything. It all depends upon weather conditions.

X Q. 55. Well, I am talking about smooth weather?

A. Well, provided favorable conditions all the time I didn't expect any other list than we had the first voyage.

X Q. 56. About five to six degrees?

A. Yes, sir.

X Q. 57. So the ten degrees, if you did get it on the second voyage, was really more than you anticipated?

A. Well, to tell the truth, I never thought about it.

X Q. 58. Well, you didn't expect the ship to list ten degrees in that smooth water?

A. I didn't expect it, but I wasn't a bit surprised when she took it.

X Q. 59. You expected she would list as she did the first voyage?

A. Yes. The ship being loaded the same way. I expected her to act the same way.

[fol. 174] Redirect examination.

Mr. Duncan:

Q. 57. On the first trip you made from Murray, when the ship went over the bar did she have a temporary list to port and then straighten out after she got over?

A. Yes. She started wobbling a bit.

Q. 58. I am talking about the first trip now, you understand?

A. Yes. She alwyas did. On the first trip and the next trip. She listed this way and——

Q. 59. Well, what way? Don't nod your head. The stenographer can't get that.

A. Well, starts rocking a bit.

Q. 60. Now, with regard to the lashings which were furnished by the ship and which you used on the first and second trip; what were those lashings? Describe them.

A. They were one inch flexible steel wire. Supposed to hold a strain of five tons.

Q. 61. What condition were they in?

A. They were fair. Used but good. They weren't new, but they were good wire.

Q. 62. Were there any defect in them, to your knowledge?

A. No.

Recross-examination.

Mr. Thompson:

X Q. 60. They were, as a matter of fact, rusty in some places? Weren't they?

A. No. They were not rusty. They were black, caused by grease. We greased the wires. They might have been rusty a little bit. They were old, discolored wire. You can't see whether it is rust or grease.

(Witness excused.)

Certificate

I certify that the foregoing is a correct transcript of my shorthand notes, taken at the time and place and in the manner therein referred to.

O. D. Hooper, Shorthand Reporter, U. S. Courts.

Portland, Maine. 10 August, 1927.

[fol. 175] LIBELLANT'S EXHIBIT 1

J. F. Whitney & Co., Ship and Steamship Brokers, 8-10 Bridge Street, New York; Board of Trade Building, Montreal, Canada.

Cable address, "Whitney" New York. All Commercial Codes Used Including Scott's 10th Edition.

Time Charter, Government Form

Approved by the New York Produce Exchange, October 20th, 1921.

This charter party, made and concluded upon in the City of New York, the 10th day of May, 1927. Between Rediri A/S Nidaros, Agents for Owners of the good Steel Screw Steamship "Nidarholm of Oslo of 2,467 tons gross register, and 1,448 tons net register, having engines of nominal horse power and with hull, machinery and equipment in a thoroughly efficient state, and classed 100 A. I at British Lloyds of about 131,000 cubic feet grain capacity and 4,265 tons dead weight capacity (cargo and bunkers, including stores not exceeding fifty tons) on Lloyd's Summer freeboard, inclusive of permanent bunkers, which are of the capacity of about 214 tons of coal, now trading, and Oxford Paper Company, Charterers, of the City of New York.

Witnesseth that the said Owners agree to let, and the said Charterers agree to hire the said Steamship from the time of delivery, for a period of three Calendar months, two weeks more or less in charterer's option. Charterers to have liberty to sublet the Steamer for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfilment of this Charter Party.

Steamer to be placed at the disposal of the Charterers, at Camden, New Jersey, in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being on her delivery ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, steam winches and donkey boiler [Vol. 176] with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise, including petroleum or its products, and passengers so far as accommodations will allow (but any expense necessary to fit the steamer to comply with United States Passenger Inspection laws to be borne by Charterers) in such lawful trades, between safe port and/or ports in British North America, and/or United States of America, and/or West Indies,

and/or Central America, and or Caribbean Sea, and/or Gulf of Mexico, and/or Mexico, and/or South America, not South Demerara and/or Europe, excluding River St. Lawrence from October 1st to May 1st, White Sea, Black Sea and Magdalena River, and all unsafe ports: the carrying of Mahogany, Cattle nad Asphalt in bulk to be excluded under this Charter, as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owners shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her class and keep the steamer in a thoroughly efficient state in hull, machinery, and equipment for and during the service.

2. That the Charterers shall provide and pay for all the Coals except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Captain, Officers or Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which steamer is responsible, then all charges incurred shall be paid by owners.

Charterers are to provide necessary dunnage and shifting boards but Owners to allow them the use of dunnage and shifting boards already aboard Steamer. Charterers to have the privilege of using shifting boards for dunnage, they making good for any damage thereto.

[fol. 177] 3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall, on expiration of this Charter Party, pay for all Coal left in the Bunkers, at the current market price at the respective places where she is delivered to them.

4. That the Charterers shall pay for the use and hire of the said Vessel ($1.55) One Dollar and Fifty-five Cents U. S. Currency per ton dw. on Lloyd's Summer Freeboard per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary

wear and tear excepted, to the Owners (unless lost) at a safe port in U. S. North of Cape Hatteras in Charterer's option.

5. Payment of said hire to be made in New York in cash, semi-monthly, in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of the Charter Party as herein specified, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers in pursuance of this charter. Delivery to count from 7 A. M. on the working day following that on which written notice has been given before 4 P. M., but if required by Charterers, loading to commence at once, such time used to count as hire.

6. That the cargo or cargoes be laden and or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground.

7. That the whole reach of the Vessel's Holds, Decks, and usual places of loading and accommodations of the Ship [fol. 178] (not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with Ship's crew and boats. The Captain, (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts.

9. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost despatch. He is to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table. Provided Charterers do not use the Supercargo privilege, Owners to victual Pilots, Tally Clerks, Stevedore's Foreman, Customs Officers, etc., as customary, free; but if Supercargo privilege is used, Charterers to pay victualing of Pilot, Tally Clerks, etc., at the current rate per meal.

11. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or Agents, and to furnish the Charterers, their Agents or Supercargo, when required, a true daily copy of Logs, showing the course of steamer and distance run and the consumption of coal.

12. That the Master shall use diligence in caring for the ventilation of the cargo.

13. ——.

[fol. 179] 14. That if required by Charterers, time not to commence before 20th of May and should Steamer not be ready for delivery on or before 30th of May, 1927, Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of Steamer's readiness.

15. That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and

the cost of any extra coal consumed in consequence thereof, and all extra expenses shall be deducted from the hire.

16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen: their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.

18. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

19. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and [fol. 180] Charterers' expenses and Crew's proportion General average, if any, to be according to York-Antwerp Rules, 1890.

If the Owners of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the Consignees or Owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but with the Ship-Owner, shall contribute in General Average, and shall pay such special charges, as if such

danger, damage or disaster had not resulted from such fault, negligence, latent or other defect, or unseaworthiness.

20. Coals used by steamer while off hire, also for cooking, condensing water for crew's use, or for grates and stoves to be agreed to as to quantity, and the cost of replacing same, to be allowed by Owners.

21. That as the Steamer may be from time to time employed in tropical waters during the term of this Charter, Steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, at least once in every six months, reckoning from time of last painting, and payment of the hire to be suspended until she is again in proper state for the service.

22. Owners shall provide gear (for all derricks) capable of handling lifts up to three tons, and maintain the gear of the ship as fitted, also provide ropes, falls, slings and blocks; but gear for heavier lifts shall be for Charterers' account. Owners also to provide lanterns and oil for nightwork, and steamer to give use of electric light, when so fitted. The Charterers to have the use of any gear on board the steamer.

23. Steamer to work night and day, if required by Charterers, and all steam winches to be at Charterers' disposal during loading and discharging; steamer to provide men [fol. 181] to work same day and night, as required, Charterers, agreeing to pay winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in Ship's Articles. If the rules of the port, or labor unions, prevent Crew from driving winches, shore winchmen to be paid by Charterers. In the event of short steam, or a disabled winch, or winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby.

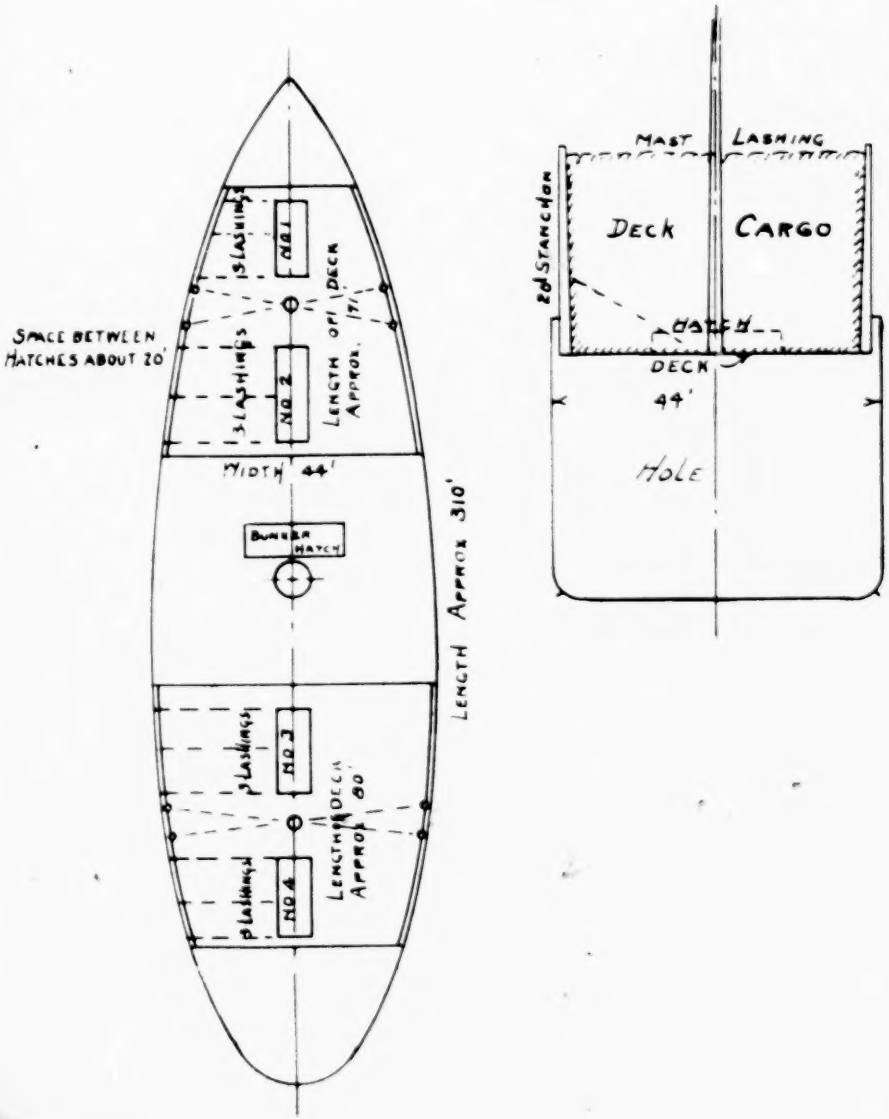
24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc.," and also subject to the rules governing the Steamship Trade of the New York Produce Exchange.

The original Charter is in the possession of J. F. Whitney & Co., New York.

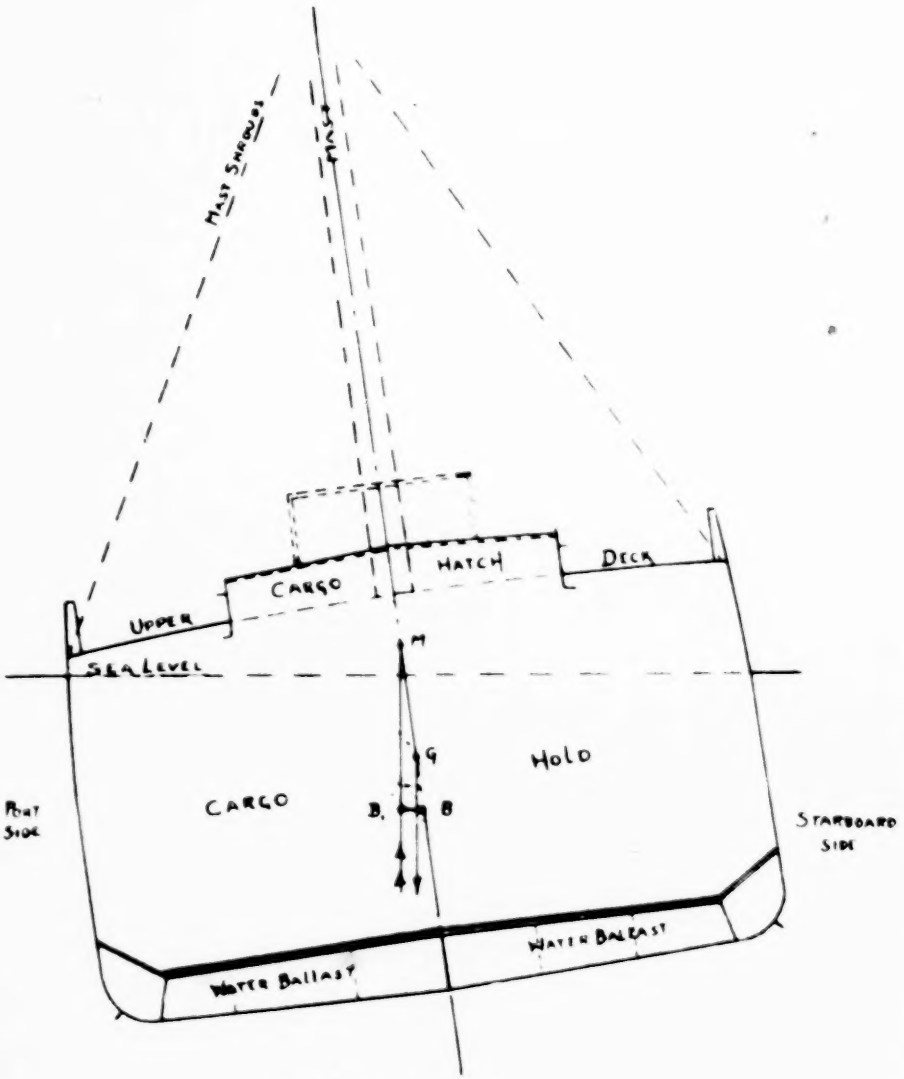
On the left margin of this Exhibit appears the following:

"Charterers to give Owners or their Agents at least 10 days' notice as to when and where they will redeliver the Steamer under this Charter."

LIBELANT'S EXHIBIT 2



BENNETT'S EXHIBIT 1

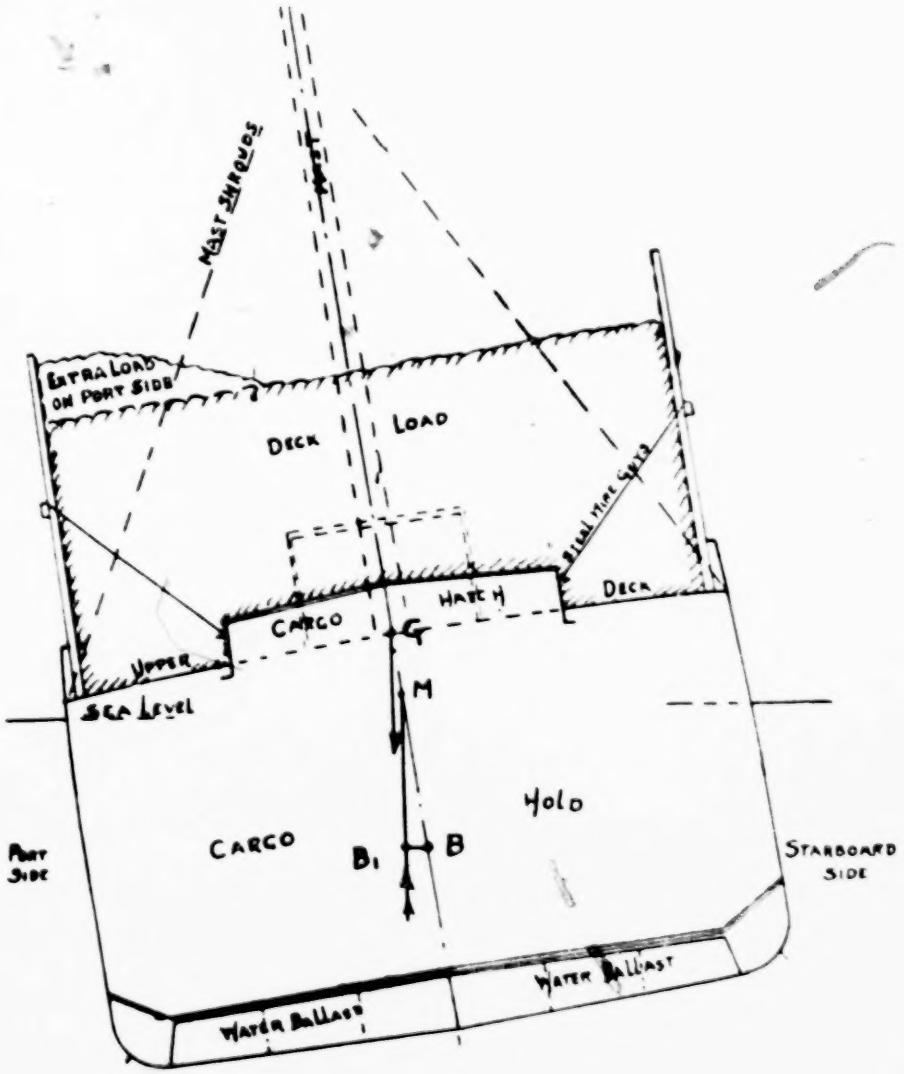


S S "NIDARHOLM"

CROSS SECTION THRO' SHIP WHEN HEELED 8° TO PORT

Y8 INCH. 1 FOOT

BENNETT'S EXHIBIT 2

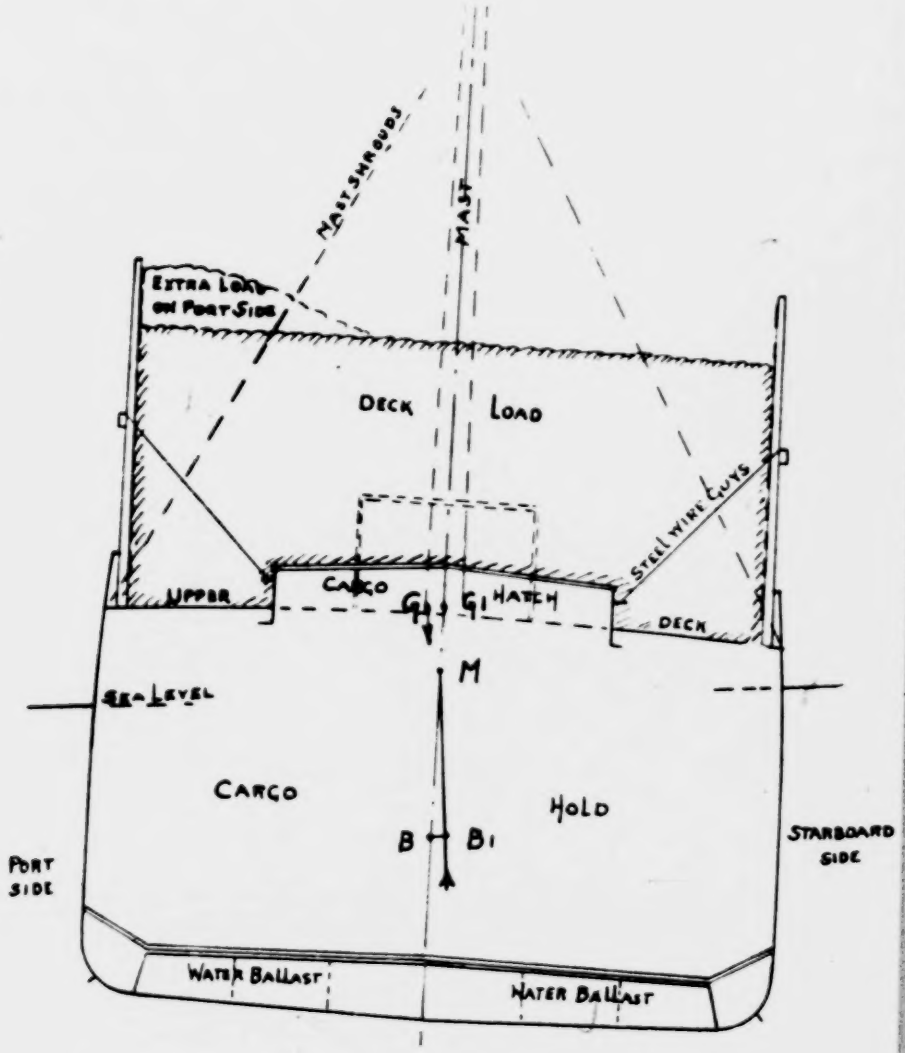


S S "NIDARHOLM"

CROSS SECTION THRO SHIP WHEN HEELED 8° TO PORT

½ INCH. 1 FOOT

BENNETT'S EXHIBIT 3

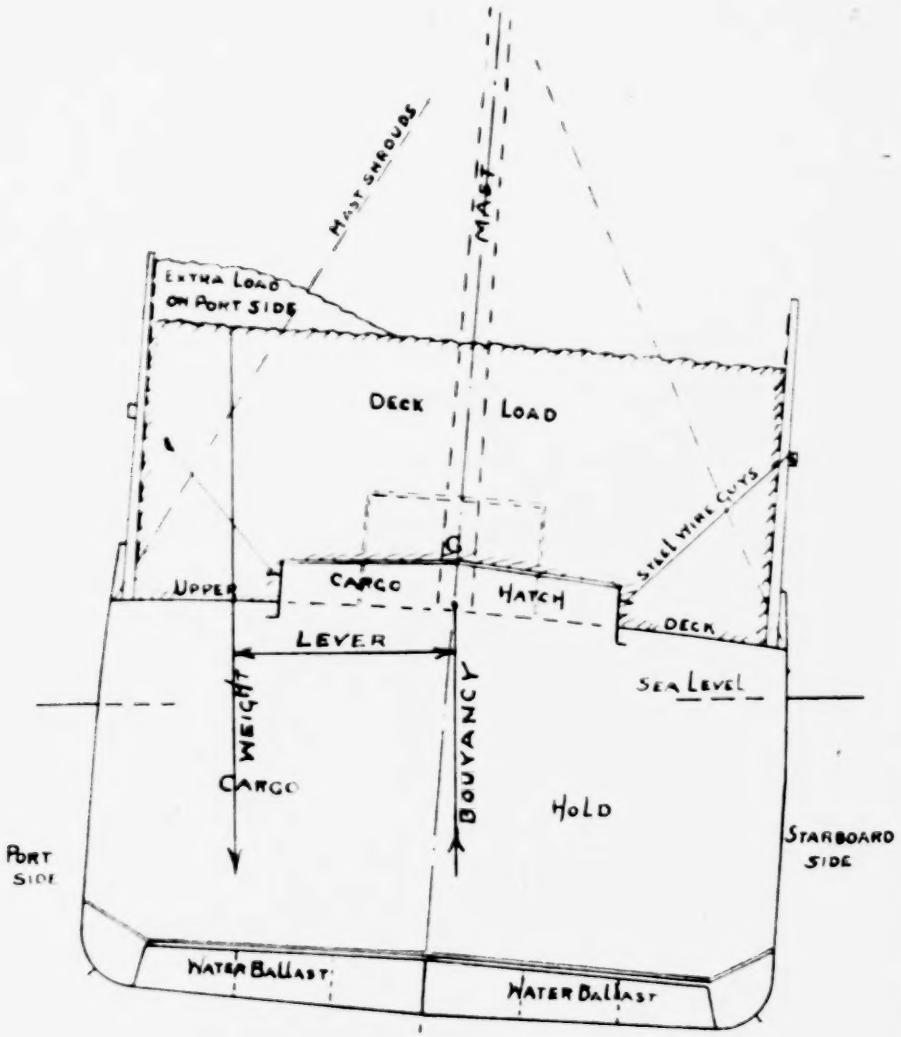


S.S. "[illegible]DARHOLM"

CROSS SECTION THRO SHIP WHEN HEELED 5° TO STARBOARD

1/8 INCH = 1 FOOT

BENNETT'S EXHIBIT 4.

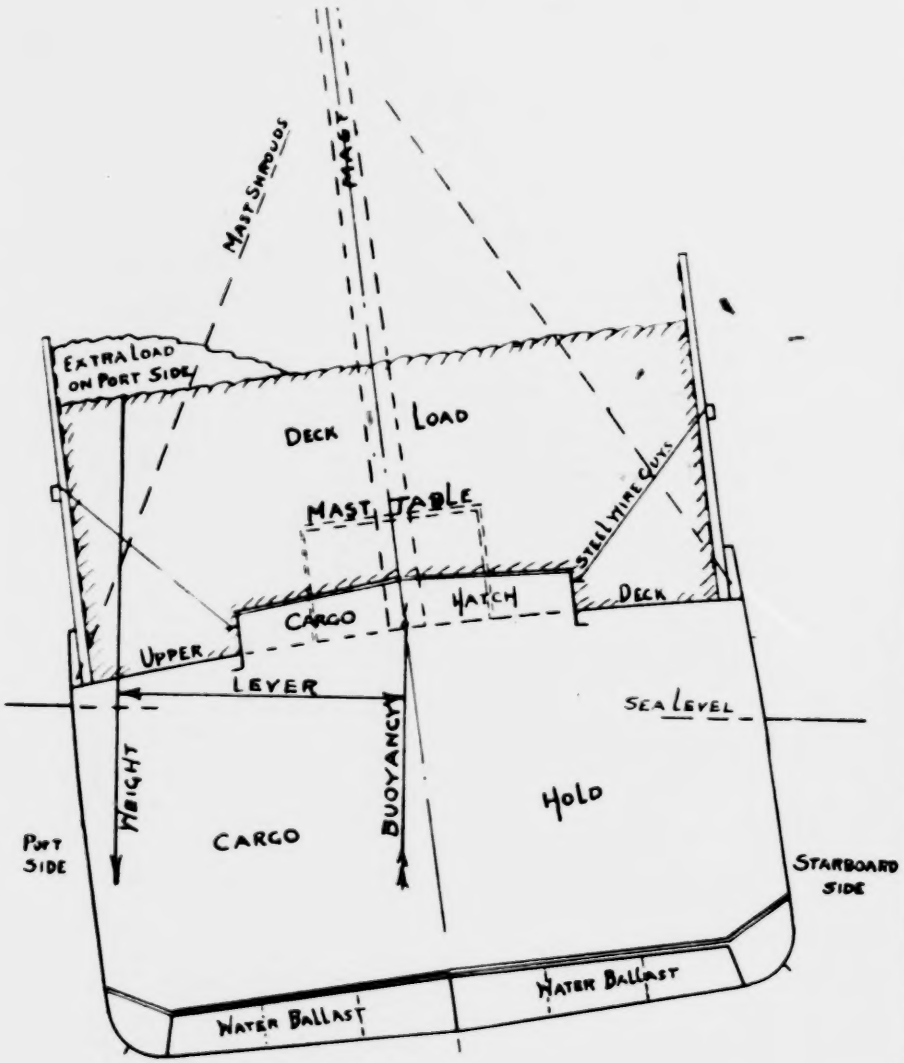


S.S "NIDARHOLM"

CROSS SECTION THRO SHIP WHEN HEELED 5° TO STARBOARD

1/8 INCH = 1 FOOT

BENNETT'S EXHIBIT 5

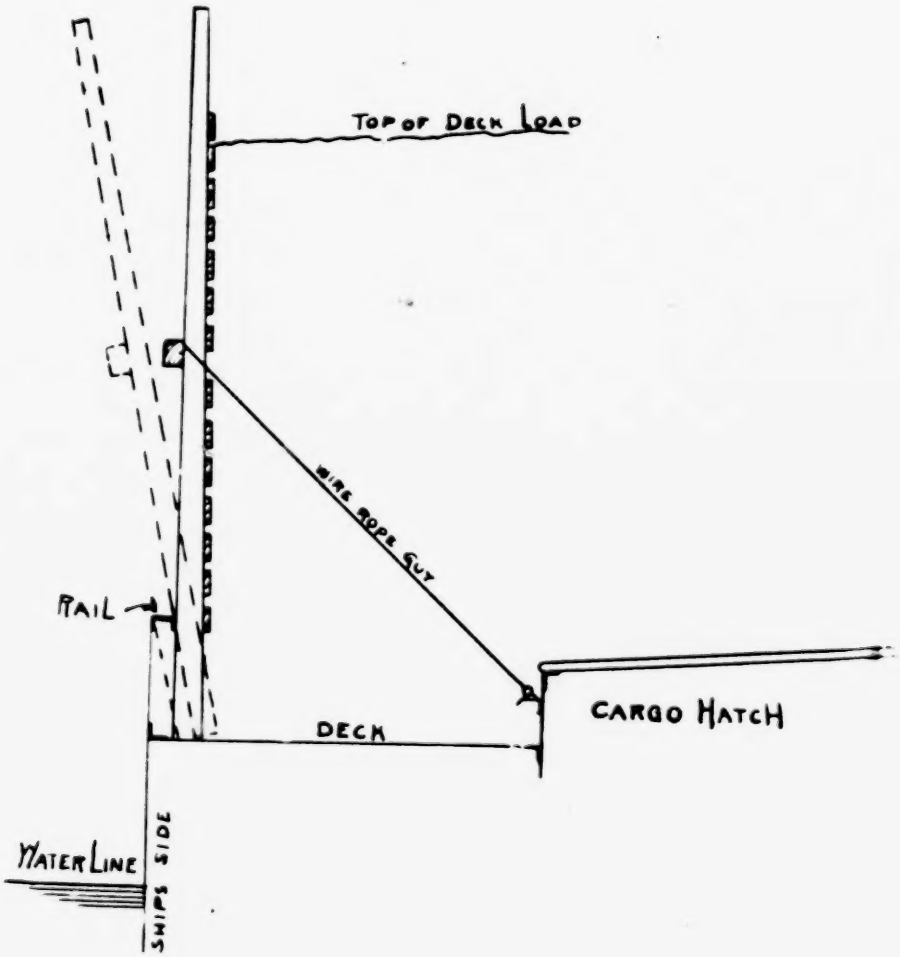


S. S. "NIDARHOLM"

CROSS SECTION THRO SHIP WHEN HEELED 8° TO PORT.

1/8 INCH · 1 FOOT.

BENNETT'S EXHIBIT 6



¼" = 1 FOOT.

25. Nothing herein stated is to be construed as a demise of the Steamer to the Time Charterers. The Owners to remain responsible for the navigation of the Steamer, insurance, crew, and all other matters, same as when trading for their own account.

26. A commission of Five per cent. upon the gross amount of this Charter, payable by the Steamship and Owners due to J. F. Whitney & Co., and also upon any continuation or extension of this Charter on hire earned and paid.

27. ——.

28. Penalty for non performance of this Contract, estimated amount of damages.

Witness to the signature of —— For Owners by Authority Kregstad's Shipping Agencies. (Sgd.) Karl Kregsted, Agents. By cable authority from , dated at —, 19 . Witness to the signature of Oxford Paper Company. (Sgd.) H. B. Mills, Manager Purchasing Dept. 5/12/27.

(Here follow Libellant's Exhibit 2 and Bennett's Exhibits 1, 2, 3, 4, 5, 6, side folios 182, 183, 184, 185, 186, 187, and 188.).

[fol. 189] STIPULATION RE CLAIMANT'S EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that claimant's Exhibits 1 and 2 need not be reproduced in the record on the appeals, but may be transmitted to the Circuit Court of Appeals in their original form and may be used by either party on the argument of said appeals with the same force and effect as if said Exhibits were included in the transcript of record.

It is further stipulated and agreed that the filing of a bond on appeal by A. S. Nidaros, the claimant and cross libellant in the above cases, may be waived.

Goodwin, Proctor, Field & Hoar, Proctors for Claimant—Cross Libellant. Woodman, Whitehouse, Skelton & Thompson, Proctors for Libellant—Cross Respondent.

IN UNITED STATES DISTRICT COURT

No. 1122. IN ADMIRALTY

OXFORD PAPER COMPANY

vs.

STEAMER NIDARHOLM

OPINION — Filed May 21, 1928

HALE, J.:

This is an action in rem, brought by the Oxford Paper Company against the Norwegian Steamship Nidarholm, to recover damages for loss of part of a cargo of pulpwood from the deck of the steamer. The owners of the Nidarholm appeared, filed a claim and bond to release the Steamship from arrest, and afterwards filed a cross libel against the Oxford Paper Company to recover for damage to the ship by reason of the pulpwood striking the side of the ship as it went overboard. Both actions arose from the same facts.

The case shows that the Oxford Paper Company has for a long time been chartering Norwegian steam vessels for the purpose of carrying pulpwood from its plant in Murray, Nova Scotia, to Portland, Maine, from which point it [fol. 190] is distributed to its various mills in Maine.

In May, 1927, a written charter party between the libelant and the owners of the Nidarholm provided that the libelant should have the entire use of the Steamship for a period of three months, in consideration of the payment of $1.55 per D. W. ton per month. Among other things in the charter party it was agreed:

"Charterers to have liberty to sublet the Steamer for all or any part of the time covered by this Charter, but Charterers remaining responsible for the fulfillment of this Charter Party. Steamer to be placed at the disposal of the Charterers, at Camden, New Jersey, in such dock or at such wharf or place (where she may always safely lie afloat, at all time of tide), as the Charterers may direct, and being on her delivery ready to receive cargo with clean-swept

holds and tight, staunch, strong and in every way fitted for the service, having water ballast, steam winches and donkey boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and fireman for a vessel of her tonnage."

It was further provided:

"8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with Ship's crew and boats. The Captain, (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency; and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

In accordance with the Charter Party, the Nidarholm was turned over to the charterer at New Jersey, and ordered to Hampton Roads, Virginia, to load a cargo of coal for Port Alfred, P. Q. She proceeded to Hampton Roads, took on a cargo of coal, and then started to Port Alfred to discharge.

[fol. 191] It appears from testimony and from the log book of the ship, that on the trip from Hampton Roads to Port Alfred the Nidarholm went ashore and was stranded for at least four days, during which time it was necessary to lighter a large part of her cargo, to run anchors out for the purpose of hauling the vessel off, and to use the vessel's cables and lines in order to run a long hawser to a towing vessel, which was finally necessary to remove the vessel from the place where she was stranded.

After the ship was refloated, she was taken to Port Alfred, where she discharged her cargo; thence she went to Quebec, where she was drydocked for about nineteen days and had her bottom repaired.

After being repaired, the ship left Quebec and arrived at the Belant's plant at Murray, for the purpose of loading a cargo of pulpwood for Portland.

The ship was prepared for loading by first placing stanchions, approximately 20 feet long and 8 to 10 inches

through the butt, around the deck at the rail, at distances of approximately 4 or 5 feet apart, for the purpose of holding the deck cargo. These stanchions were held in place by wire rope lashings running from ring bolts in the hatch coamings to about the center of the stanchions. The wire lashings supported the stanchions at a point about 6 or 7 feet above the ship's rail or 10 to 11 feet above the deck; above that point the stanchions had no support. It is claimed in testimony by the libelant that this method of holding the deck load had been adopted by libelant ever since it commenced transporting pulpwood from Murray to Portland. Several hundred thousand cords had been transported with the deck load secured in this manner. The cargo consisted of 1,575 cords of pulpwood logs. The logs were round, cut into 2 foot lengths and varied in diameter from 4 to 18 inches. They were loaded through chutes running out over the deck of the ship.

The holds of the vessel were first loaded with pulpwood; then the deck cargo, held in place by the stanchions, was put on board. The trip on which the loss occurred was the second trip that the Nidarholm had undertaken in this service, and the deck load at the time the Nidarholm started was [fol. 192] approximately 17 feet high. The loading was done under the supervision of the master of the Nidarholm.

When the ship left the dock, she had a starboard list of about 5 degrees; while she was backing away she would come to an even keel, and then drop back to her starboard list. After the backing movement had been completed, she came up on an even keel, slowly listed over to port, and proceeded to sea. As she went down the harbor, the port list gradually increased until she was listing between 10 and 14 degrees to port; when she was less than one-half hour away from her loading berth and in practically smooth water. Each movement of her helm caused the list to increase or decrease according to her course, and, shortly following one helm movement, she listed to port to such a degree that part of her deck cargo went over the port side. When she was lightened of part of her deck cargo, she whipped sharply back to starboard, and listed to starboard so much that her officers feared she would go over completely. After cleaning off the cargo on the starboard side,

she again listed back to port, and cleaned off the balance of the deck cargo above the rails. The pulpwood, something more than 300 odd cords, was carried to sea by the ebb tide then running.

The answer by the claimant alleges the causes of the loss to have been:

"1. The deck cargo was improperly and negligently loaded, stowed, trimmed and secured by the libellant.

2. The stanchions supporting the deck cargo were of balsam spruce, a wood of insufficient strength to be put to such use, and said stanchions were weak and not fit for the use to which they were put.

3. The said stanchions were improperly set up in that they were placed at too great an interval from each other.

4. The deck cargo was not properly secured to withstand the ordinary strains of navigation.

5. And other respects to be shown at the trial."

[fol. 193] I think it unnecessary to conclude how far the answer should be held to be admissions of the liability of the ship. I prefer to decide the case upon the testimony presented.

In behalf of the ship it is contended that the loss was due to the breaking of the cribbing constructed by the charterer in accordance with its duty under the charter party; that the cribbing broke before the ship had heeled to half the extent that was reasonably to be expected; and it is alleged that the charterers were responsible for the stanchions and the cribbing under the agreement of the charter party, even if the loading was to be done under the supervision of the captain. It is pointed out that, on the first trip of the ship from Murray to Portland, she carried a deck cargo about the same in character as that carried on the second trip, except that on the latter trip the cargo was wet and somewhat heavier; that the first trip was made without loss and that when the first cargo was discharged at Portland the stanchions and cribbing were left standing, as she proceeded without any cargo back to Murray; that on the first trip the ship had a 5 degree list to starboard when she left the dock,

but when she turned around in the stream and felt her helm, she straightened up and gradually took a 5 degree list to port; that the list increased as the ship went down the channel and over the shallow bar at the entrance to the harbor, but on reaching open water she came back to a 5 degree list which was carried all the way to Portland; that as she left the dock on the second trip, the steamer behaved precisely as she had done on the first trip; she straightened up as the turn of the stream was made, and then sagged down slowly to a 5 degree list to port; but the 5 degree list continued until she reached the bar at the mouth of the bay, when the list to port increased to about 10 to 14 degrees, either because she smelled the bottom or because of a change in helm. She held the increased list for a short time, when the captain heard a "crack" forward and soon after all the stanchions on the port side broke and about half the deck load on the forward well deck went overboard; that, at no time prior to the time when the first section of the cribbing broke, did the steamer list as far as she might be expected [fol. 194] to roll by action of the sea during the course of the voyage, and not as far as she had rolled on the first trip; that, although the ship was "tender" after her loading was completed, such tenderness did not render her unseaworthy for such a voyage, and was not the proximate cause of the loss; that the condition of "crankiness" did not render the ship unseaworthy for the voyage, but when the cargo went overboard all the stanchions in that section of the cribbing broke.

The learned proctor for the ship contends that the captain was fully justified in assuming that his deck cargo was secured to withstand the ordinary perils and adventures of the voyage; that he had a right to assume that the cribbing was strong enough to meet all ordinary contingencies; that he was confirmed in this belief by the fact that this cribbing had adequately supported the deck cargo on the first trip to Portland; and that in view of the provisions of the charter party which required the charterer to load and stow the cargo, and in view of the fact that the cribbing was constructed by a civil engineer employed by the charterer and that the loading and stowage were under the supervision of the charterer's boss stevedore, McAulay, who had loaded between 100 and 125 ships for deck cargo in a similar man-

ner, the captain was fully justified in assuming that the erection of the cribbing and the loading and stowing of the cargo were properly done.

The charter party provides that the "charterers are to load, stow and trim the cargo at their expense, under the supervision of the master." It provides also that the ship should be, "on her delivery ready to receive cargo, with clean swept holds and tight, staunch, strong, and in every way fit for the service." There was an affirmative warranty of seaworthiness on the part of the ship, in addition to the implied warranty of seaworthiness in every contract that a ship makes for her voyage. Under the doctrine of the maritime courts, seaworthiness includes not only fitness in respect to the hull, machinery and equipment, but also with respect to the preparation for and stowage of the cargo.

[fol. 195] In Corsar v. Spreckles & Bros. Co., 141 Fed. 260, 264, speaking for the Circuit Court of Appeals in the Ninth Circuit, Judge Ross said, "Indeed, unless otherwise expressly stipulated, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of affreightment. Caledonia, 157 U. S. 130, 151. And this includes not only a ship seaworthy in hull, and equipment, which conditions it is conceded the Musselcrag met, but also seaworthy in respect to the stowage of the cargo." This case is cited in Harloff et al v. Barber & Co., 150 Fed. 185, in which case Judge Adams in the District Court said:

"The duty is upon the owner of a ship to render her fit in design, structure, condition and equipment to encounter the ordinary perils of the voyage and to be fit for the receipt and carriage of a special cargo. Carver on Carriage by Sea, Secs. 18, 19a, 20. It is also said by the same author (section 273): 'The duty of stowing the cargo in the ship lies on the owner, and on the master as his representative, unless there is an agreement to the contrary. The master ought to be a competent stevedore, and he must see that the stowage is done with skill and care. * * * Moreover, the ship must provide whatever dunnage may be required * * * such as mats, battens, loose wood, etc. These are needful to keep the goods in their places * * *.' A

chartered vessel in the absence of a special agreement, is required to supply herself with proper fittings for the carriage of lawful cargo. Dene Steam Shipping Co. Ltd., v. Tweedie Trading Co. (D. C.) 133 Fed. 589; Id., (C. C. A.) 143 Fed. 854."

Poore on Charter Parties, Section 3:

"The seaworthiness of the ship is under the absolute control of the master. Neither he nor his owners are excused because the charterers load the ship in such a way as to make her unseaworthy."

[fol. 196] In Olsen v. United States Shipping Co., 213 Fed. 20, Judge Ward said:

"The charterer loaded timber on deck both forward and aft. The after deckload was lashed by the crew but the loading of the forward deckload was not completed before dark, so that it could not be lashed that day. The charterer was anxious to have the steamer leave on the morning tide for Ship Island, to save a day, there being but one tide a day in the Gulf. The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deckload and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deckload in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The district judge held that the expenses connected with the falling of the deckload at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deckload and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deckload. The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deckload, a thing which it was the duty of the master to prevent.

* * * * * * *

It is true that when charterers load cargo against the protest of the master in such a way that it is itself dam-

aged and or damages other cargo, the charterer will be liable. The Centurion (D. C.) 57 Fed. 412. Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseawor- [fol. 197] thy when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. If makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading insisted upon his taking the deckload, or that surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

In Knohr & Burchard v. Pacific Creasoting Co., 181 Fed. 856, 858, the court said:

"It is claimed, however, that the ship and owners were relieved from responsibility for bad stowage, by reason of the facts that the charter party provides that Messrs. Andrew Weir & Company, should have the nomination of the stevedore to stow the cargo, and that said firm did select the stevedore. The mere selection, however, of the stevedore, did not deprive the captain of his authority to control the operation of loading, and to insist upon stowage satisfactory to him; and the evidence proves that the stevedores worked under the supervision of a marine surveyor employed by the captain, and that the system of stowing between decks was agreed to by the captain, his marine surveyor, the stevedore and a representative of Andrew Weir & Co. This evidence certainly leaves the responsibility for stowage upon the captain of the ship where it usually rests. The Dana, 190 Fed. 650."

In the case before me, under the rules of maritime law, I find nothing in the proofs which excuses the captain for putting to sea in an overloaded vessel; and it is clear that [fol. 198] no ship is seaworthy unless her deck cargo is properly stowed, and unless the stanchions supporting it are of sufficient strength and properly placed and the cargo properly secured. The captain is presumed to be responsible for the ship without any express provision in the charter; and here there is an express provision in the charter giving him the supervision of the loading.

The proofs show that the master and mate saw the stanchions and found no fault with them; that the lashings were furnished by the ship and put on by the ship's crew. It appears in evidence that the superintendent in charge of the plant at Murray recommended to the master that he put an athwartship lashing at the foremast, the same to go around the foremast and be made fast on the stanchions opposite the foremast. This lashing the captain refused to use on his first trip. It appears that the suggestion was renewed by the libelant's superintendent on the second trip and the captain again refused to put it on; and it was on this trip that the loss occurred. It appears that on the third trip the lashing was put on.

It appears that the same stanchions, used at the time of the loss, were used on the trip previous, without trouble; that the stanchions were in place when the ship returned from Portland to Murray at the end of the first trip; that during all this time, the master and mate had a chance to examine, and did examine, the stanchions; and the master says: "If I had seen that there was anything untoward in the loading of the ship, I would have protested."

The proofs are clearly persuasive that the captain exercised his duty of supervision. During the night the stevedore, McAulay, was left in charge, with instructions to call the captain at 4 in the morning; but in loading, the list had become so great that the stevedore called the captain before 4 o'clock; the master came on the bridge in his night clothes and gave orders with reference to the loading, conferred with and directed the chief engineer; and, at the request of the stevedore, the master stayed on deck until the loading was completed. There is evidence tending to show that the captain might have been encouraged by the fact that, on

[fol. 199] the first voyage, the ship had proceeded in safety with almost as much tonnage on deck as she had on the second trip, and that although she listed very heavily she came to Portland in safety. He says that he ordered the cargo trimmed, and when she left the dock she was drawing 19 feet 4 inches forward and 21 feet 5 inches aft. She was 2½ inches below her load marks. Without going into more details of loading, it appears from the captain's testimony that the ship in calm weather and smooth water, while still within the harbor limits, was listed to her maximum angle of safety, and according to Carmichael, a disinterested witness, she was exceeding her angle of safety by 3 or 4 degrees. At every movement of the helm after the vessel left the dock up to the time of the loss, her list changed materially, and, immediately following a sharp movement of the helm, the cargo went off the port forward deck, abreast the foremast, at the place where the athwartship lashing proposed by the libellant should have been. It seems clear to me, even if the breaking of the stanchions and the lashing was the immediate cause of the cargo going over the rail, that the list of the vessel was caused by her overloaded condition, over which the captain must be held by law and in fact to have been responsible. The captain seems to have been unduly encouraged by the fact that he got safely to Portland on another trip when the ship had listed even more than on this trip; but he admits that the cargo on this trip was somewhat heavier than on the previous trip.

From the action of the ship in smooth water, I cannot escape the conclusion that she was unfit to face the perils of the sea along the exposed area of the Atlantic coast from Murray to Portland. One of the ship's disinterested witnesses testified that the ship's actions indicated "crankiness" and that by crankiness he meant being "top heavy," and the pilot testified:

"Q. 71. Now, whether or not in your opinion, based on your observations on the morning that you piloted the Nidarholm down when this loss occurred, in your judgment that ship would have reached Portland harbor with that deck load on her?

A. Well, I don't think she would.

[fol. 200] Q. 72. You don't think she would?

A. No.

Q. 73. And why not?

A. On account of the list she had.

Q. 74. Have you, in your experience in piloting vessels over these same waters, with this same kind of cargo, seen vessels act the same as the Nidarholm did at that time?

A. No, sir.

Q. 75. You never did?

A. No, sir."

Upon the proofs I think the master cannot escape liability from the fact that the loading was done by the charterers. It was done under the supervision of the captain; and the cases make no different rule where the charterers are also the owners, as in the instant case.

In the Olsen case, supra, the Circuit Court of Appeals for the Second Circuit went so far as to hold an implied warranty of seaworthiness of the ship in a case where the charterers did the loading and insisted upon the master's taking the deck load which afterwards had to be thrown over on account of its not having been secured properly before the ship sailed. And in that case one of the surveyors had certified that the ship could take the deck load in safety. The court held that these facts did not lessen the master's duty even if the master himself had thought that the deck load was not sufficiently secure, but had yielded to the charterers.

The learned proctor for the ship cites two cases which he contends to be decisive that the charterers, not the ship, should be held liable for bad stowage in the instant case.

In The Thomas P. Beal, 11 Fed. (2nd) 49, 52, the court had before it an action to recover for the loss and damage to barrels of oil, a part of a mixed cargo. The loss occurred by reason of the charterer loading the barrels of oil in a part of the ship that was too warm for the cargo. Speaking for the Circuit Court of Appeals in the Third Circuit, Judge Wooley said:

"On the issue of liability for bad stowage, as between the time charterer and the shipowner, the time charterer relies mainly on cases which hold generally, and very prop- [fol. 201] erly, that responsibility for the seaworthiness of a chartered ship is on the shipowner," citing many cases.

"But that, generally, means responsibility for seaworthi-

ness of the ship as against perils of the sea; it does not, in every instance, mean responsibility for her seaworthiness in repect to stowing cargo."

The court then discusses at some length the facts in the case and shows that the charterer booked the freight, designated places of stowage, did the stowing itself through its own stevedores, and "assumed all responsibility therefor." In that case the stowage of the cargo had nothing to do with the ship's seaworthiness, as it did in the instant case.

In the case before me, the charter affirmatively makes it the duty of the master to supervise the loading and stowing, and the proofs show that he did actually attend to such supervision.

In The Santona, 152 Fed. 517, 518, Judge Hough, then District Judge in the New York District, had before him a case where action was brought by the shipowners to recover for charter hire. The charterer attempted to offset the claim for hire by claiming a short delivery on some of the cargoes. The question was whether the mate was the agent of the ship or of the charterer. Judge Hough said:

"Nor is there any difficulty in formulating the consequences flowing from a letting of the ship, as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of shipper and carrier. Carver (4th Ed.) Sec. 112; The Barnstable, 181 U. S. 469, 21 Sup. Ct. 684, 45 L. Ed. 954. The difficulty lies, not in the statement of the rule of the recognition of the consequences thereof, but in its application to the infinitely varying circumstances of contract between shipowners and charterers. It appears to me that the best test of the applicability of the rule to any given state of facts is to inquire whose were the agents who wrought the [fol. 202] injury out of which the controversy in hand arose. It is the same inquiry put by Lord Esher, in 1 Q. B. 258: 'When is the captain the owner's captain?' That question, as applied to this case, is: Was the mate, when tallying cargo, the owner's mate? And the answer to that question must be ascertained by considering the provisions of the charter party affecting the receipt, carriage, and delivery of cargo as between owner and charterer.

Under the very ordinary form of time charter, involved in this cause, it shocks knowledge common to all men acquainted with maritime business to say that the owner has surrendered the possession or control or command or navigation of his ship. But he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterers' gains. It follows that, when the mate was tallying cargo, he was the charterers' mate, and the set offs for shortage claimed by the respondent are disallowed."

I have quoted quite fully from Judge Hough because he shows the difficulty of applying the rule between charterers and owners "to the infinitely varying circumstances of a contract between shipowners and charterers."

In the case before me there was "an estate carved out of the ship and handed over for a specified term to the [fol. 203] charterer." The ship was placed at the disposal of the charterers; and the captain was under the direction of the charterers for certain purposes. But the charterers were to load "under the supervision of the captain, who is to sign bills of lading for cargo as presented in conformity with Mate's or Tally Clerk's receipts," and as has already been found, the captain did affirmatively superintend the stowage and decided as to the details of the loading.

In view of the language of the charter in the instant case, and of all the testimony, I am constrained to find that it was the duty of the shipowner to have the ship seaworthy at the commencement of the trip, in hull, equipment and also in the preparation for and stowage of the cargo; that this duty rested on the master; that, under the doctrine of

the leading maritime cases, the master cannot excuse himself by the provision of the charter that the loading should be done by the charterers "under the supervision of the captain." The proofs show that the master did not intend, or attempt, to delegate his duties with respect to the loading; he personally supervised and "bossed" the loading, trimming and securing of the cargo. Even if the charterers furnished the stanchions which broke under the strain, clearly the charterers were obliged to furnish only such stanchions as would withstand a seaworthy ship, and not a ship unseaworthy by reason of being overloaded. The stanchions furnished were used on previous trips without trouble, and, from the proofs, I see no reason to find that they would not have resisted any strain brought upon them in a properly loaded ship. I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master.

The cross libel is dismissed with costs. A decree may be entered for the libelant in No. 1122, with costs.

The case is referred to George F. Gould, Esq., and Albert B. Hall, Esq., assessors, to determine damages.

[fol. 204] In United States District Court

Interlocutory Decree.—Filed May 28, 1928

Oxford Paper Company

vs.

Steamship "Nidarholm"

Hale, J.

This cause came on to be heard on the eighth day of May, 1928, and was argued by proctors for the respective parties, and now upon consideration thereof and in accordance with the written opinion filed in said matter on the 21st day of May, 1928, it is on this 26th day of May, 1928,

Ordered, adjudged, and decreed that the Oxford Paper Company, the libellant in the above entitled cause, recover full damages against the Steamship "Nidarholm" by

reason of the loss sustained, as set forth in the libel filed by said Oxford Paper Company in said matter.

It is further ordered, adjudged and decreed that George F. Gould, Esq., and Albert B. Hall, Esq., both of Portland, in said District, be and they hereby are appointed assessors to determine and report to the Court the amount of damages sustained by the libellant in No. 1122.

By the Court, John F. Knowlton, Clerk.

C. H.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO DAMAGES—Filed December 16, 1928

[Title omitted]

It is stipulated and agreed by and between the proctors for the respective parties that the amount of damages suf-
[fol. 205] fered by Oxford Paper Company in this case is the sum of $5,737.52, and interest thereon from August 1, 1927, in the amount of $473.35.

Nathan W. Thompson, Proctor for Libellant and Cross Respondent. Goodwin, Proctor, Field & Hoar. Robert R. Duncan, Proctor for Claimant and Cross Libellant.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed January 12, 1929

OXFORD PAPER COMPANY

vs.

STEAMSHIP NIDARHOLM

A. S. NIDAROS

vs.

OXFORD PAPER COMPANY

These causes, being cross actions, having come on to be heard on the 9th day of April, 1928, and an interlocutory

decree having heretofore been duly entered in these causes, to wit, on the 26th day of May, 1928, referring said causes to Albert B. Hall, Esq., and George F. Gould, Esq., Commissioners, to ascertain, compute and report the amount of damages suffered by the Oxford Paper Company, and thereafter said causes having been continued from time to time, when by agreement of parties, the amount of the damages suffered by the Oxford Paper Company, libellant and cross respondent, were agreed upon in accordance with a stipulation entered in this court on the 14th day of December, 1928, to wit, the sum of $5,737.52 principal and the sum of $473.35 interest to the date of the entry hereof, now on motion of Woodman, Whitehouse, Skelton & Thompson, proctors for the Oxford Paper Company, it is hereby

Ordered, adjudged and decreed

(1) That the Oxford Paper Company have, receive, and recover of and from the said Steamship Nidarholm, her tackle, apparel and furniture, and her stipulators, the sum of $5,737.52 principal and $473.35 interest, or a total amount of $6,210.87, together with the sum of $217.64, being [fol. 206] the costs due the said Oxford Paper Company, as libellant, in the original libel, and as respondent in said cross libel, making a ttal of $6,428.51, together with interest thereon from the date of the entry of this decree until paid.

2. That the cross libel of A. S. Nidaros against the Oxford Paper Company be dismissed.

It is further ordered, adjudged and decreed that unless this decree be satisfied, or an appeal be taken within the time and manner prescribed by law, that execution shall issue forthwith against said Steamship Nidarholm and the stipulators therein.

John A. Peters, District Judge.

Jany. 12, 1929.

Assented to as to form, Goodwin, Proctor, Field & Hoar, Proctors for Claimant and Cross-Libellant.

In United States District Court

[Titles omitted]

Petition for Appeal—Filed January 12, 1929

The claimant and cross libellant in the above entitled libel and cross libel, A. S. Nidaros, being aggrieved by the decrees, rulings and findings of the United States District Court for the District of Maine, Southern Division, in said cases, claims an appeal from said decrees, rulings and findings, and prays that its said appeal may be allowed.

A. S. Nidaros, by Goodwin, Proctor, Field & Hoar, Proctors.

J. A. P.

[fol. 207] In United States District Court

[Titles omitted]

Assignment of Errors—Filed January 12, 1929

Now comes A. S. Nidaros, the claimant and cross libellant in the above entitled causes, appellant, and having claimed an appeal to the Circuit Court of Appeals, files this its assignment of errors.

The District Court erred in the following respects:

I. In finding that:

1. The port list of the "Nidarholm" gradually increased as she went down the harbor from the dock at Murray on the trip in which the loss occurred until she was listing between 10 and 14 degrees to port.

2. When the deck cargo was lost the "Nidarholm" listed to an angle of more than 14 to 15 degrees.

3. After the loss of the first deck cargo on the port side the "Nidarholm" listed to starboard so badly that her officers feared she would go completely.

4. "Shortly after one helm movement she listed to port to such a degree that part of her deck cargo went over the port side."

5. The captain of the "Nidarholm" was requested at any time to put on an athwartship lashing over the deck cargo.

6. Any thing ~~at~~ all was said to the Captain of the "Nidarholm" about an athwartship lashing over the deck cargo at the commencement of the trip during which the loss occurred.

7. That ship's officers examined the stanchions after the [fol. 208] first trip under the charter party.

8. The "Nidarholm" listed to her maximum angle of safety within the harbor limits and before the loss of the first deck cargo.

9. The "Nidarholm" was unfit to face the perils of the trip from Murray to Portland.

10. The Captain of the "Nidarholm" decided as to the details of the loading of the vessel for the trip in which the loss occurred.

11. The stanchions supplied by the charterer would have resisted any strain brought upon them in a properly loaded ship.

12. "The loss was occasioned solely by reason of the ship being overloaded with a deck cargo improperly stowed under the supervision of the master."

13. The "Nidarholm" was 2½ inches below her load marks when she left the dock on the trip during which the loss occurred.

14. The "Nidarholm" was overloaded to a degree which affected her safety.

15. The list of the "Nidarholm" changed materially with every movement of her helm after she left the dock.

16. The cargo first went overboard "at the place where the athwartship lashing proposed by the libellant should have been."

17. The "Nidarholm" stranded on her first trip to Murray under the charter party.

II. In failing to find that:

1. The proximate cause of the loss was the weakness and faulty construction of the cribbing erected by the charterer.

2. The first section of deck cargo was lost when the ship had a list to port of 10 degrees.

3. At no time before the loss of the first deck cargo did the "Nidarholm" list to port more than 14 degrees.

4. The maximum angle of safety of the "Nidarholm" upon the trip in which the loss occurred and before the loss of any deck cargo was from 30 to 40 degrees.

5. If the cribbing retaining the deck cargo had been strong enough to stand the strain, the "Nidarholm" could have rolled at least 15 to 18 degrees safely and without losing any of her deck cargo.

6. The stanchions supplied by the charterer were not capable of resisting the strain of ordinary navigation in a seaworthy ship.

[fol. 209] 7. At no time prior to the loss of the first deck cargo did the "Nidarholm" list as much as she would reasonably be expected to roll upon a voyage such as the one she was beginning.

III. In ruling that:

1. Under the charter party the obligation of the ship owner to furnish a seaworthy ship included the obligation to see that the deck cargo was properly stowed and that the stanchions furnished by the charterer were of sufficient strength and properly placed and the cargo properly secured.

2. Under the charter party in this case the owner of the "Nidarholm" was liable for the negligent construction of the cribbing retaining the deck cargo and/or for the negligent stowage of the deck cargo.

3. The owner of the ship failed in any respect in its duty to furnish a seaworthy ship.

4. Under the charter party the duty to properly secure the deck cargo rested solely on the master of the ship.

5. Although the charter party provided that the cargo should be loaded and stowed by the charterer, and the cargo belonged to the charterer, the responsibility for damage to and loss of cargo occasioned by negligent loading and stowing rests solely upon the ship.

6. The libellant is entitled to recovery.

IV. In failing to rule that:

1. The libel of the Oxford Paper Company should be dismissed.

2. The charterer had a duty under the charter party to load and stow the deck cargo in such a way as to be capable of withstanding the strains ordinarily to be expected upon a voyage such as that in question.

3. Under the charter party the charterer was under a duty to furnish stanchions of sufficient strength to withstand the ordinary strains of navigation.

4. If the owner of the "Nidarholm" was in any way negligent with respect to the erection of the deck stanchions and cribbing and/or the loading and stowage of the cargo therein, the libellant was also negligent in that respect, and the damages should be divided.

[fol. 210] 5. That the cross libellant is entitled to recover from the Oxford Paper Company for the injuries sustained by the ship when the deck cargo went overboard.

V. In entering a decree in favor of the libellant.

VI. In dismissing the cross libel.

A. S. Nidaros, by Goodwin, Proctor, Field & Hoar, Proctors.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed January 28, 1929

To the Clerk of said Court:

DEAR SIR: Appeals having been claimed by the claimant and cross libellant in the above entitled actions, and the cases having been consolidated by order of court, you are requested to make up and transmit to the Circuit Court of Appeals a transcript of the record, which transcript we desire to contain the following:

(1) Libel.
(2) Claimant's Claim.
(3) Claimant's Answer.
(4) Cross Libel.

(5) Answer of Cross Respondent.

(6) Testimony as taken on behalf of the Libellant and Cross Respondent, and as taken on behalf of the Claimant and Cross Libellant, in question and answer form.

(7) Opinion of the Court.

(8) Interlocutory Decree.

(9) Stipulation of the parties as to the amount of Libellant's Damages.

(10) Final Decree.

(11) Petition for Appeal.

(12) Assignment of Error.

(13) All Exhibits except Claimant's Exhibits 1 and 2, which, by agreement of parties, are to go up to the Circuit Court of Appeals in their original form.

(14) Order of Consolidation.

(15) Stipulation as to bond on appeal and Claimant's Exhibits 1 and 2.

Goodwin, Proctor, Field & Hoar. Woodwan, Whitehouse, Skelton & Thompson.

[fol. 211] Citation in usual form showing service on Nathan W. Thompson omitted in printing.

[fol. 212] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 213] In United States Circuit Court of Appeals, First Circuit

No. 2335

Steamship Nidarholm, A. S. Nidaros, Appellant,

v.

Oxford Paper Company, Appellee

Appeal From the District Court of the United States for the District of Maine

Before Bingham, Morton and Morris, JJ.

Opinion—August 21, 1929

Morton, J.

The question is whether the "Nidarholm" was liable for the loss of part of a deck-load of pulp-logs which went overboard when the stanchions holding them broke.

The facts are stated in the opinion of the District Judge and need not be repeated. (26 Fed. (2d) 92.) His conclusions that the steamer because of excessive loading and too much deck-cargo was top-heavy and unseaworthy when she began the voyage,—faults for which her master was responsible,—were clearly correct.

The only point which requires discussion is whether the charterer was also at fault. The cribbing which gave way was not part of the steamer's equipment. She was under no obligation to furnish it, and did not undertake to do so. The charterer having hired the whole of the vessel chose [fol. 214] to increase her capacity for deck-cargo by erecting on each deck (forward and aft) these crate-like containers rising twenty feet above the decks and about fifteen feet above the bulwarks. The work was planned and done by the charterer's men under the supervision of its superintendent. The master of the Nidarholm said that he was unfamiliar with such structures and left it to them. The steamer supplied ex gratia at the chatrerer's request some of the lashings, and her men made them fast. The master does not appear to have been consulted at all about the dimensions or material of the stanchions and stringers, or the way in which the crib was put together. He was consulted about the lashings and expressed the opinion that one reaching from side to side at the foremast was unnecessary. The cargo was loaded into the crib entirely by the charterer. The logs were laid fore and aft,—a method which under the working of the vessel might impose severe wedging strains on the side-supports. It was changed on the next voyage.

The accident started with the breaking either of a lashing or a stanchion on the port side of the forward deck. The testimony is that ultimately every stanchion broke, while only about half of the lashings, at most, gave way; the master and mate say less than one-third. For the lashings to hold and the stanchions to break, indicates pretty conclusively that the stanchions themselves were of insufficient size or unsuitable material. Much larger ones were used on the next voyage. The failure of the cribbing in the quiet waters of a harbor under a list which was by no means as much as the steamer would be expected to roll on her voyage down the coast shows that there was some-

thing radically wrong with its construction, or with the way in which the logs were stowed, or with both.

As to dangers of a distinctly maritime character and unusual stresses set up by the movement of a vessel at sea which lie peculiarly with the knowledge and experience of mariners, the charterers were entitled to rely on the master's judgment. Lawrence v. Minturn, 17 How. 100, 112 (discussing liability of vessel for deck cargo); Blaikie v. [fols. 215 & 216] Stembridge, 6 C. B. n. s. 894; Corsar v. Spreckles, 141 Fed. 260 (C. C. A. 9); The Oakley C. Curtis, 4 Fed. (2d) 979 (C. C. A. 2), The Thomas P. Beal, 11 Fed. (2d) 49 (C. C. A. 3). This accident was not due to causes of that character. McKnight knew as well as Captain Christophersen that the steamer would heel or roll, and that the cribbing must be strong enough to withstand the stresses which such motions would set up. We are not convinced that the steady pressure occasioned by the list was so much harder on the cribbing than rolling as to account for its breaking. The construction of the cribbing was,—taking the facts most favorably to the charterer,—a joint undertaking carried out by the charterer and the vessel; for the failure of it each was at fault; and the loss should be divided.

The decree of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant in this court.

[fol. 217] United States Circuit Court of Appeals

[Title omitted]

Before Bingham, Morton and Morris, JJ.

Opinion on Petition for Rehearing—December 11, 1929

Per Curiam. The duty of the master of the steamer with respect to dangerous loading or stowage is fully recognized in our opinion holding her liable.

None of the decisions referred to by the petitioner on the question of its own fault covers or even closely resembles this case, which appears to be rather unusual in its facts.

The installation of the cribbing was not a suppling of equipment or fittings necessary to secure cargo coming within the reasonable capacity afforded by the ship's structure, but an enlargement of her structural capacity for carrying goods beyond what she could otherwise naturally and reasonably take. This the ship was not required to [fol. 218] provide in the absence of special agreement. As the installation in this case was made by the charterer it was under the duty of exercising due care and skill that the containers were properly constructed; and it is not excused for its failure in those respects by the facts that the master did not object to the way in which the containers were built, and permitted the vessel to go to sea with them.

Petition denied.

[fols. 219-221] In United States Circuit Court of Appeals

Final Decree—August 21, 1929

This cause came on to be heard April 9, 1929, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, August 21, 1929, here ordered, adjudged and decreed as follows: The decree of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, with costs to the appellant in this court.

By the Court, Arthur I. Charron, Clerk.

Petition for rehearing covering 4 pages, filed Sept. 19, 1929, omitted from this print. The petition was denied and nothing more on Dec. 11, 1929.

[fol. 222] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—December 11, 1929

It is ordered that the petition for rehearing filed September 19, 1929, be, and the same hereby is, denied.

By the Court, Arthur I. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTE RE ORDER STAYING MANDATE

Thereafter, to wit, on January 3, 1930, upon motion of appellee, mandate was stayed until further order of court.

[fol. 223] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 224] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 28, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,846. U. S. Circuit Court of Appeals, First Circuit. Term No. 58. Oxford Paper Company, Petitioner, vs. Steamship "Nidarholm," A. S. Nidaros. Petition for writ of certiorari and exhibit thereto. Filed March 5, 1930. File No. 34,846.

FILE COPY

NO. ~~[illegible]~~ 58

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 2335

OXFORD PAPER COMPANY,
LIBELLANT — APPELLEE

vs.

STEAMSHIP NIDARHOLM
A. S. NIDAROS,
LIBELLEE — APPELLANT

PETITION OF THE OXFORD PAPER COMPANY LIBELLANT - APPELLEE, FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN W. LOWRANCE,
Proctor for the Oxford Paper Company.

MARKS PRINTING HOUSE PORTLAND ME

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

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LIBELLEE — APPELLANT

PETITION OF THE OXFORD PAPER COMPANY LIBELLANT - APPELLEE, FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, The Justices of the Supreme Court of the United States:

The petition of the Oxford Paper Company, a corporation duly organized and existing under the laws of the State of Maine, for a writ of certiorari to be directed to the Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the cause therein pending entitled—

No. 2335

STEAMSHIP NIDARHOLM
A. S. NIDAROS,
CLAIMANT - APPELLANT

v.

OXFORD PAPER COMPANY,
LIBELLANT - APPELLEE.

To the Honorable, The Justices of the Supreme Court of the United States:

The petitioner, the Oxford Paper Company, respectfully shows as follows:

FIRST: That your petitioner, a Maine Corporation, is engaged in the business of manufacturing paper in the State of Maine and is the owner of large pulp wood tracts in the Province of Nova Scotia, from which it has for a long period of time, been transporting pulp wood by steam vessels to Portland, Maine, from which latter point the pulp wood is forwarded by rail to the Company's mill.

In May, 1927, the Oxford Paper Company entered into a written charter party with the owners of the Norwegian Steamship Nidarholm to carry pulp wood from Nova Scotia to Portland, Maine, by the terms of which charter it was agreed that the Oxford Paper Company should have the entire use of said steamship Nidarholm for a period of three months on consideration of the payment of $1.55 per dw. ton per month.

The charter party provided, among other things:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with Ship's crew and boats. *The Captain* (although appointed by the Owners), *shall be under the orders and direction of the charterers as regards employment or agency; and Charters are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

In accordance with the terms of the charter party, the Steamship Nidarholm was turned over to the charterer at New Jersey and was ordered by the charterer to go to Hampton Roads, Virginia, for the purpose of carrying a load of coal from that port to Port Alfred, P. Q. After receiving a full and complete cargo of coal at Hampton Roads, the Nidarholm proceeded for Port Alfred, P. Q., but, on the way, the vessel ran ashore and remained stranded for about

four days, during which time it was necessary to lighter a large part of the vessel's cargo and run anchors and use the ship's cables in an endeavor to free the vessel.

The vessel was obliged to go on a railway for repairs but she finally arrived at the plant of the Oxford Paper Company in Murray, Nova Scotia.

PREPARATIONS FOR LOADING

Steps were immediately taken to prepare the vessel to receive the pulp wood cargo and this was done by first placing stanchions, which are wooden poles approximately twenty feet long and eight to ten inches through the butt, around the deck near the rail of the Vessel at a distance of approximately four to five feet apart, for the purpose of holding the deck cargo in place. These stanchions were furnished by the Oxford Paper Company and were held in place by wire rope lashings running from the ring bolts in the hatch coamings to approximately the center of the stanchions (see Exhibits 5, 6 page 187, 188). *These lashings were furnished by the ship, and put in place by the ship's crew.* An athwartship lashing running from the stanchion on one side opposite the foremast to and around the foremast to the stanchion on the opposite side, was suggested by the Oxford Paper Company to the master of the steamship. The master declined to follow the suggestion and such lashing was not used until *after* the loss, as hereinafter set forth.

After the stanchions were in place and fastened, the loading then commenced.

LOADING

The loading was done by means of a chute run out over the vessel's deck, and the pulp wood then came up on an endless chain, ran down the chute, from which it dropped into the vessel. The hold of the vessel was first filled and then the deck load which was held in place by the stanchions, was placed on board. The entire loading was done

under the direction and supervision of the master of the Nidarholm (The District Court so found).

The Captain, *who was the servant of the owners*, determined when the ship had sufficient cargo and also determined its trim, and when the ship was loaded to the Captain's satisfaction she sailed for Portland on her first trip under this charter, where she arrived without mishap; and on her return trip to Murray the stanchions were left standing, and on her arrival back loading was immediately commenced for the second trip.

On the second loading, everything proceeded as on the first until the ship was nearly loaded, when she started to list toward the wharf and act cranky. The stevedore immediately called the Captain and from that time until the loading was completed, the Captain ordered the cargo trimmed, just as he wanted it, and also determined the amount of the cargo and *insisted, against the advice of the stevedore, on taking more cargo than he had on the previous trip.* (See Opinion of District Court, Page 199.)

When the loading was completed the ship's docking lines were let go and the ship started on the second voyage.

ACTION OF SHIP UPON LEAVING DOCK AND STARTING TOWARD SEA

When the ship left the dock, she had a starboard list of approximately five degrees and as she backed away with her rudder amidships, she would straighten up to an even keel and then gradually drop back to the starboard list. This performance continued until the backing maneuver had been completed; and when the Nidarholm started ahead, she came up on an even keel and slowly listed over to port.

There is no contention but what the entire loss as hereinafter mentioned, took place in perfectly smooth waters, within the inner harbor of Murray.

As the Nidarholm proceeded down the harbor, the port list which she took when she started ahead, gradually increased until the vessel was listing from ten to fourteen degrees to port, and each movement of the vessel's helm

would cause the list to increase or decrease according to the vessel's course; and shortly following one sharp helm movement, the Nidarholm listed so badly that a part of her deck cargo went over the port side. When the weight of this cargo was taken from the port side, the vessel listed sharply to starboard and cleaned off the deck cargo on that side and then continued to roll back and forth until the entire deck cargo had been rolled off.

The wood was carried out to sea by an ebb tide that was then flowing, and was practically a total loss.

BEFORE THE UNITED STATES DISTRICT COURT

The hearing and argument of the case before the District Court occurred about the 4th day of May 1928, and all of the libellant's witnesses on both sides testified before the Court, with the exception of the master and mate of the Steamship Nidarholm.

The claimant did not call any other members of the ship's crew, and never attempted to explain such failure.

The Judge of the District Court ruled and held the Nidarholm solely in fault, for the following reasons:

I: That the duty was on the ship and her owners to have the ship seaworthy when she left Port.

II: That seaworthiness includes the proper stowing and staying of the deck cargo.

III: That the ship at the time of the loss was unseaworthy.

IV: That the shipowner is not relieved because the loading is done by the charterer's stevedore especially in this case as the loading was done under the supervision and instructions of the master, as the agent of the owners.

V: Because the loss may have been caused by the Captain's refusal to put the athwartship lashings as recommended by the libellant.

and thereupon a final decree for the libellant was entered in the District Court for the sum of $5,737.52 plus interest and costs.

BEFORE THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals agreed with the District Court that the Nidarholm at the time of the loss and at the time she left the Port was overloaded and clearly unseaworthy. The Court of Appeals also found the libellant in fault for not furnishing proper cribbing to hold the deck cargo in place, and the Court of Appeals ordered the decree of the District Court reversed and damages divided. *Thus reaching a conclusion just contra to the ruling of the Circuit Court of Appeals for the Second Circuit on facts almost identical.*

ON RE-HEARING

The libellant-libellee filed a petition for re-hearing and on December 11, 1929, the Circuit Court of Appeals passed down a second opinion reiterating its former opinion that the vessel was unseaworthy at the time she left the dock and at the time the loss of the deck cargo occurred, but also found that the vessel was under no obligation to furnish cribbing, and the libellant was not excused by the fact that the Captain had acquiesced in its use.

In this second opinion, as in the first, the Court of Appeals entirely overlooked the fact that the cribbing broke because the load placed against it by the master of the ship in making his own ship unseaworthy, was an excessive load, and more than the stevedore thought should be taken by the ship and because the stanchions were not supported by the athwartship lashing suggested by the libellant.

In other words, the Circuit Court of Appeals held the charterer in fault for failure to furnish stanchions to hold a load that made the ship itself unseaworthy.

And your petitioner presents herewith a certified copy of the entire record of said cause in the Circuit Court of Appeals.

And thereupon your petitioner prays that a writ of certiorari be issued from this Court to the United States Circuit Court of Appeals for the First Circuit requiring said Circuit Court of Appeals to certify and send to this

Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals to the end that the said cause may be reviewed by this Honorable Court as provided or by law for the following reasons:

I: Because the Court of Appeals in this case has made a ruling of law directly contrary to the ruling of the Circuit Court of Appeals for the Second Circuit in the case of Olsen vs. United States Shipping Co., 213 Fed. 18.

II: Because the ruling made by the Circuit Court of Appeals is directly contrary to the law in such cases as made by this Court to the effect that it is the ship's duty to properly stay and secure her cargo regardless of who loads it.

III: Because the Court of Appeals has refused to follow the rule laid down by this Court in the case of Lawrence vs Minturn, 17 Howard 392.

IV: Because the Court of Appeals having found the ship unseaworthy, did not as a matter of law hold the ship wholly in fault for the loss.

I, John W. Lowrance, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the Court, do hereby certify that the foregoing Petition for a Writ of Certiorari has been examined by me, and that, in my opinion, for the reasons therein set forth, the Writ ought to issue as prayed for.

JOHN W. LOWRANCE,
Proctor for the Oxford Paper Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 2335

In the Matter of

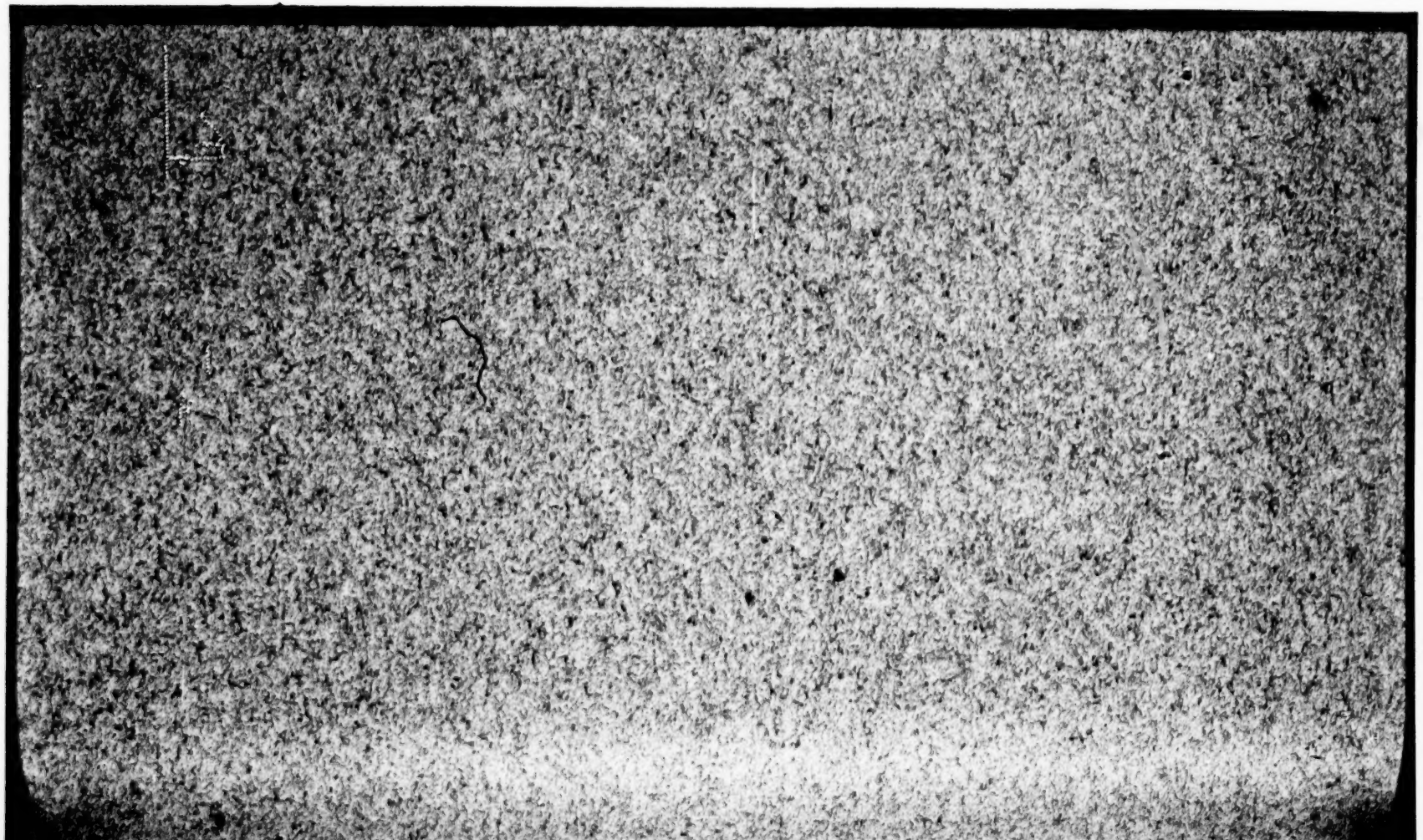
PETITION OF OXFORD PAPER COMPANY

For a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit

BRIEF IN SUPPORT OF PETITION

JOHN W. LOWRANCE
NATHAN W. THOMPSON,
For the Petitioner.

MARKS PRINTING HOUSE PORTLAND, ME



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

In Admiralty

No. 2335

OXFORD PAPER COMPANY
Petitioner
v.
STEAMSHIP NIDARHOLM
A. S. Nidaros

Steamship Nidarholm
A. S. NIDAROS
v.
OXFORD PAPER COMPANY

BRIEF FOR OXFORD PAPER COMPANY
Petitioner for Certiorari,
IN SUPPORT OF PETITION

I.

THE CAPTAIN WAS THE SERVANT OF THE SHIP-OWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED.

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

II.

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

(a) The loss was the direct result of this unseaworthiness

III.

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS AND BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP AND IMPROPERLY STOWED THE CARGO.

IV.

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS

ARGUMENT.

I.

THE CAPTAIN WAS THE SERVANT OF THE SHIPOWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED

The charter party, section 8, reads as follows:

"8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all the customary assistance with Ship's crew and boats. The

> Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency; and *Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

Thus by the very terms of the contract the master of the ship was the shipowner's servant for the purpose of supervising the loading and stowing of the cargo.

Unless there is an agreement to the contrary, the master is always considered agent of the shipowner, so far as the duty of loading and stowing the cargo is concerned.

In the case of *Harloff, et al. v. Barber & Co.*, 150 Fed. 185, on pp. 192, 193, *Adams*, District Judge, said:

> "'The duty of stowing the cargo in the ship lies on the owner, and on the master as his representative, unless there is an agreement to the contrary. The master ought to be a competent stevedore, and he must see that the stowage is done with skill and care. * * ' Moreover, the ship must provide whatever dunnage may be required * * * such as mats, battens, loose wood, etc. These are needful to keep the goods in their places. * * *"
>
> A chartered vessel in the absence of a special agreement, is required to supply herself with proper fittings for the carriage of lawful cargo."

On this point, the *District Court*, in its opinion in the case at bar, on page 198 said:

> "The Captain is presumed to be responsible for the ship without any express provision in the charter; and here there is an express provision in the charter giving him the supervision of the loading."

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

Of this fact there can be no doubt. It was found as a fact by the District Court, and never seriously questioned

by the Court of Appeals. In the opinion of the District Court, page 201 the court said:

> "In the case before me, the charter affirmatively makes it the duty of the master to suprevise the loading and stowing, and *the proofs show that he did actually attend to such supervision.*"

On page 198 the District Court further said:

> "The proofs are clearly persuasive that the captain exercised his duty of supervision"

And on page 200:

> "Upon the proofs I think the master cannot escape liability from the fact that the loading was done by the charterers. *It was done under the supervision of the captain;* and the cases make no different rule where the charterers are also the owners, as in the instant case."

The Circuit Court of Appeals found the Captain responsible for overloading the ship. First Opinion of the Circuit Court of Appeals, page 213:

> "The facts are stated in the opinion of the District Judge and need not be repeated. (26 Fed. (2d) 92. His conclusions that the steamer because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage—*faults for which her master was responsible*—were clearly correct."

Therefore both the District Court and the Circuit Court of Appeals found the ship was overloaded, and the Captain as the shipowner's agent, responsible for this condition.

II.

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

This fact is no longer open to dispute. The District Court found it as a fact, saying on page 199:

"Without going into more details of loading, it appears from the captain's testimony that the ship in calm weather and smooth water, while still within the harbor limits, was listed to her maximum angle of safety, and according to Carmichael, a disinterested witness, she was exceeding her angle of safety by 3 or 4 degrees. At every movement of the helm after the vessel left the dock up to the time of the loss, her list changed materially, and, immediately following a sharp movement of the helm, the cargo went off the port forward deck, abreast the foremast, at the place where the athwartship lashing proposed by the libelant should have been. It seems clear to me, even if the breaking of the stanchions and the lashing was the immediate cause of the cargo going over the rail, *that the list of the vessel was caused by her overloaded condition, over which the captain must be held by law and in fact to have been responsible.* The captain seems to have been unduly encouraged by the fact that he got safely to Portland on another trip when the ship had listed even more than on this trip; but he admits that the cargo on this trip was somewhat heavier than on the previous trip." * * *

"From the action of the ship in smooth water, I cannot escape the conclusion that she was unfit to face the perils of the sea along the exposed area of the Atlantic coast from Murray to Portland."

On page 203 the District Court said:

"I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

The Circuit Court of Appeals did not differ with the District Court on this point, and on this question of seaworthiness the Circuit Court of Appeals said, on page 213:

"The facts are stated in the opinion of the District Judge and need no be repeated. (26 Fed. (2nd) 92). His conclusions that the steamer because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage,—faults for

which her master was responsible,—were clearly correct."

Therefore both courts agreed that the ship was unseaworthy at the commencement of the voyage, and both courts found the master responsible for this condition.

The law is clear that a ship must be seaworthy at the commencement of the voyage, and this means seaworthy not only in respect to hull but also with respect to the *preparation* for and the *stowage* and staying of the cargo.

In the case of *Lawrence v. Minturn*, 17 How. 392, the *Supreme Court* on page 403 said:

> "The master is bound to use diligence and skill in stowing and staying the cargo (speaking of deck cargo)."

That the cargo was not properly stayed is definitely proven by the fact it went overboard while the ship was in calm water in the inner harbor. Thus we say in this respect the captain had not fulfilled his obligation to the charterer. *Lawrence v. Minturn* further holds that the ship owner is not responsible for the loss of a deck cargo brought about by a sea peril, and while the point is not raised in that case no other inference can be drawn from the opinion than that for loss caused by other than sea peril, the ship is clearly responsible. In the *Minturn* case the *Supreme* Court says on page 402:

> "The extent to which we understand them to go, and the law which we intend to lay down is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, *by a storm*, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden."

On the same page the Court further said:

> "Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly stanch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, not until heavy seas were encountered."

Can there be any doubt but the Supreme Court would, under its ruling in the Minturn case, hold this ship wholly responsible for the loss of the deck cargo in smooth water in the harbor?

We say that the case of *Lawrence v. Minturn* is direct authority for holding the ship owner responsible for any deck cargo lost through failure of the master to properly stay and secure the cargo from other than perils of the sea.

Again, referring to the authority of *Lawrence v. Minturn*, *Judge Ward*, speaking for the Circuit Court of Appeals for the Second Circuit, in the case of *Olsen v. United States Shipping Co.*, 213 Fed. 18, on pp. 20 and 21 said:

> "Likewise, when cargo loaded on deck by agreement is lost because of *a peril of the sea* the ship will be excused. Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deckload or that surveyors

certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

An page 20 *Judge Ward* further said:

"The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deckload and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deckload in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The district Judge held that the expenses connected with the falling of the deckload at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deckload and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deckload. The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deckload, a thing which it was the duty of the master to prevent."

In the case of *the Seguranca*, 250 Fed. 19, the Circuit Court of Appeals for the Fifth Circuit (construing a charter party, using practically the identical language as the charter in this case where it related to the captain's supervision of the loading), stated that it was immaterial what caused the tenderness of the ship, whether it was overloading, or improper stowage of the cargo, because the master was responsible in the final windup to have his ship seaworthy on going to sea. And the court in that particular case held that the cause of the improper stowage was due partly to the master of the ship, and partly to the stevedore, as the Court of Appeals did in the case at bar, but the Court in *The Seguranca* still held the ship solely responsible for the loss.

On page 22 the Court of Appeals said:

"The appellant claimed as an offset damage alleged to have been suffered by him because of improper loading of the Seguranca by the stevedores employed by the appellee as charterer, consisting in the expense of removal of part of the cargo and loss of revenue, claimed to have been due to shortage of cargo due to improper loading. The evidence is conflicting as to whether the admitted tenderness of the ship after it was loaded was due to improper stowage of the cargo or to the alleged crankiness of the ship herself. We find it unnecessary to determine as between these causes. Section 15 of the charter party provided that:

" 'The charterers or their agents shall provide and pay a stevedore to do the stowing of the cargo under the supervision of the master.'

"One Tracy was employed by the charterer to do the loading. His testimony is to the effect that the loading was done in a manner known to and approved by the master, and that additional cargo of resin, a subject of complaint by the appellant, was put on the ship only after the intention to do so was made known by Tracy to the master, and that the master made no objection, until after it was loaded on the ship, and that the first objection or protest made by the master was after the ship was loaded and when a list became apparent. It is true that the evidence of the master, Dixon, is partly in conflict with Tracy's. The District Judge, after hearing the evidence of both, came to the conclusion that any improper stowing of cargo was due to the joint fault of the stevedore, Tracy, and the master, Dixon, and under the terms of the charter party, it was made the master's duty to supervise the stowing of the cargo. Under these circumstances, we agree with the conclusion reached in the District Court that the appellant should take nothing by reason of this offset."

In the case of The Dana, 190 Fed. 650, the cargo was furnished by the charterer, and the amount put abroad was also determined by the libellant's agent, still the Court held

the ship responsible because the captain did not refuse or reject to carry the amount offered, nor did he object to the way in which the load was placed on his vessel. The Court held that the master held his vessel out as being able, loaded as she was, to satisfactorily carry the cargo to its destination.

On page 653, the Court said:

> "It appears that the load was furnished by the libellant and that the quantity offered was also determined by the libellant's agent, while the captain of the vessel only supervised, in a general way, the placing of the cargo, and indicated the quantity which he would undertake to carry. There, again, the master's actions were of a negligent character. He did not refuse or object to carry the amount offered, nor did he object to the way in which the load was placed upon his vessel. So it must be assumed that he undertook the voyage with the cargo in the condition in which it was put upon his vessel, and therefore that the vessel was held out to be seaworthy, to the extent of being able to undertake what her master undertook to do with her."

Poore on Charter Parties, Section 3 reads as follows:

> "The seaworthiness of the ship is under the absolute control of the master. Neither he nor his owners are excused because the charterers load the ship in such a way as to make her unseaworthy."

(a) *The loss was the direct result of this unseaworthiness.*

The District Court found as a fact that the cause of the loss was the unseaworthiness of the vessel. On page 203 the District Court said:

> "I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

Although the District Court saw and heard all but two of the witnesses, the Circuit Court of Appeals failed to give proper consideration to the findings of fact made by the District Court, and the Circuit Court of Appeals found that

the loss was caused partly by the unseaworthiness of the vessel, and partly by the insufficient strength of the cribbing, and the improper stowage of the Cargo. Now we say that if our interpretation of the cases on pages 8-12 above is correct, it is wholly immaterial whether the District Court or the Circuit Court of Appeals is correct on its findings as to the cause of the loss, for it was the positive duty of the master of the ship, as the agent of the owners, to make his ship not only seaworthy in hull and machinery, but seaworthy in respect to stowage and staying of the cargo.

On this very point the Circuit Court of Appeals in the Olsen case (supra) on page 21 said:

> "It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking the deckload or that the surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

The findings of the Supreme Court in the case of *Lawrence v. Minturn*, supra pages 8, 9 and the findings of the Circuit Court of Appeals for the Second Circuit in the *Olsen* case supra are conclusive in this case

III.

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP AND IMPROPERLY STOWED THE CARGO.

The District Court found as a fact that the stevedore suggested the placing of an athwartship lashing running from the foremast to the stanchions, on each side, as shown in Exhibit 5 on page 187 of the record. The District Court further found that the Captain declined to put such a lashing on.

On this phase of the matter, the District Court on page 198 said:

> "It appears in evidence that the superintendent in charge of the plant at Murray recommended to the master that he put an athwartship lashing at the foremast, the same to go around the foremast and be made fast on the stanchions opposite the foremast. This lashing the captain refused to use on his first trip. It appears that the suggestion was renewed by the libelant's superintendent on the second trip and the captain again refused to put it on; and it was on this trip that the loss occurred. It appears that on the third trip the lashing was put on."

Regarding the placing of this same lashing the Circuit Court of Appeals found on page 214, as follows:

> "He (the captain) was consulted about the lashings and expressed the opinion that one reading from side to side at the foremast was unnecessary."

The finding of fact by the District Court should be conclusive.

The testimony shows that where this lashing would have been was where the cargo first started to go (see Opinion of District Court, page 199), and we say that regardless of the question of the master's duty to make his ship seaworthy, the Captain's refusal to put this lashing on and thereby properly stay the cargo, may well have been the immediate cause of the loss, for which the ship was clearly responsible, regardless of all other facts in the case.

IV.

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS.

No proof is necessary to show that if the cargo had been properly loaded and stayed and the ship had been seaworthy, the cargo would not have gone overboard in the calm waters of the inner harbor as it did in this case. If our interpretation of the cases quoted above is correct to the effect that it was the duty of the Captain to see that his cargo was properly stowed and stayed and his vessel seaworthy, it must follow as a conclusion of law that the ship was solely responsible for this loss.

We therefore contend that on the facts as found by the Circuit Court of Appeals, regardless of the facts found by the District Court, the rulings of law by the Circuit Court were erroneous and in direct conflict with the Circuit Court of Appeals for the second Circuit in the Olsen case, supra pages 9, 10, 13 and the rulings of the Supreme Court in the case of Lawrence v. Minturn, supra pages 8, 9.

In view of the importance of the question involved; the difference in the views of the law taken by the two courts; the departure of the Court of Appeals from the established rules laid down by this court, and the rule laid down by the Circuit Court of Appeals for the Second Circuit, the writ should issue as prayed for.

JOHN W. LOWRANCE,

NATHAN W. THOMPSON,

Proctor for the Oxford Paper Company,

Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 58

OXFORD PAPER COMPANY, PETITIONER

v.

STEAMSHIP "NIDARHOLM," A. S. NIDAROS

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MARKS PRINTING HOUSE, PORTLAND, ME.

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Opinion of Circuit Court of Appeals (second opinion), reported 36 Fed. (2nd) 227.

HISTORY OF PROCEEDINGS

This is an action *in rem* brought by the Oxford Paper Company, a Maine corporation, operator of a large paper mill in Maine, against the Norwegian Steamship Nidarholm, to recover damages as result of a loss of part of a deck cargo of pulp wood belonging to the Oxford Paper Company, from the deck of the Steamship Nidarholm while it was proceeding from Murray, Nova Scotia, to Portland, Maine. The owners of the Nidarholm appeared, filed a claim and bond to release said steamship from

arrest, and subsequently filed a cross libel against the Oxford Paper Company to recover for alleged damage to said ship by reason of the pulp wood striking the side of the ship as it went overboard.

Both actions arose from the same set of facts and were, by order of the District Court, consolidated, and tried together.

The District Court saw and heard all the witnesses, with the exception of two, the Captain and Mate of the Nidarholm, and after due consideration the District Court held that the Nidarholm was *unseaworthy* at the commencement of the voyage in question, that the loss was caused by such unseaworthiness, and the ship was therefore wholly in fault for the loss. Subsequently a decree was entered for the libellant, referring the matter to an assessor to assess the damages, and the cross libel against the Oxford Paper Company by the owners of the Nidarholm was dismissed.

The parties agreed on the damage without the reference, and a decree was entered for the libellant in the amount of $6,428.51. An appeal was taken by the owner of the Nidarholm, and the case was argued in the Circuit Court of Appeals in April, 1929. The Circuit Court of Appeals agreed with the District Court that the Nidarholm was *unseaworthy* at the commencement of the voyage, for which it held the steamer in fault, but that court also held the libellant in fault because it furnished the cribbing to stay the deck cargo, which cribbing gave way, and allowed the deck cargo to go overboard. Thus, the Circuit Court of Appeals held both parties in fault, and divided the damages.

A petition for re-hearing was filed by the libellant, and the Court of Appeals, after some delay, filed a second opinion, affirming its original finding, and denied the petition for re-hearing, but again reiterated its finding of fact that the vessel was *unseaworthy* at the commencement of the voyage.

STATEMENT OF FACTS

There is very little dispute on the facts, and they may be briefly stated as follows:

The Oxford Paper Company, libellant-petitioner for certiorari, hereinafter called libellant, has been engaged in the manufacture of paper in the State of Maine for a long period of time, and is the owner of large timber lands in the Provinces. For a number of years, it has been chartering Norwegian steam vessels for the purpose of carrying pulp wood from Murray, Nova Scotia, to Portland, Maine, from which latter point the pulp wood is forwarded to its mill by railroad.

CHARTER PARTY

In May, 1927, a written charter party was entered into between said Oxford Paper Company and the owners of the Norwegian Steamship Nidarholm, by the terms of which it was agreed that the Oxford Paper Company would have the entire use of said Steamship Nidarholm, except quarters for officers and crew, for a period of three months, in consideration of the payment of $1.55 per d. w. ton per month. The charter party, among other things, contained the following:

> SEC. 8. "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners) shall be under the orders and direction of the Charterers as regards employment or agency; *and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts." (Italics ours.)

In accordance with the terms of the charter party, the Steamship Nidarholm was turned over to the charterer at New Jersey and was ordered by the charterer to go to Hampton Roads,

Virginia, for the purpose of carrying a load of coal from that port to Port Alfred, P. Q. After receiving a full and complete cargo of coal at Hampton Roads, the Nidarholm proceeded for Port Alfred, P. Q., and thence to Murray, but, on the way, the vessel ran ashore and remained stranded for about four days, during which time it was necessary to lighter a large part of the vessel's cargo and run anchors and use the ship's cables in an endeavor to free the vessel.

The vessel was obliged to go on a railway for repairs, but she finally arrived at the plant of the libellant in Murray, Nova Scotia, where she was immediately made ready to receive cargo.

PREPARATIONS FOR LOADING

Steps were immediately taken to prepare the vessel to receive the pulp wood cargo, and this was done by first placing stanchions, which are wooden poles approximately twenty feet long and eight to ten inches through the butt, around the deck near the rail of the vessel at a distance of approximately four to five feet apart, for the purpose of holding the deck cargo in place. To these stanchions are fastened planks and timbers, thus forming a cribbing to stay the cargo. These stanchions were furnished by the Oxford Paper Company (libellant) and were held in place by wire rope lashings running from the ring bolts in the hatch coamings to approximately the center of the stanchions (see Exhibits 5, 6, pages 187, 188). These lashings were furnished by the ship, and put in place by the ship's crew. An athwartship lashing running from the stanchion on one side opposite the foremast to and around the foremast to the stanchion on the opposite side (see Exhibit 2, page 182) was suggested by the Oxford Paper Company to the master of the steamship. The master declined to follow the suggestion and such lashing was not used on the trip in question, but was used on subsequent trips (Opinion, p. 194; Evidence, p. 35).

After the stanchions and cribbing were in place and fastened, the loading commenced.

LOADING

The loading was done by means of a chute run out over the vessel's deck, and the pulp wood (which was about two feet long and four inches to eighteen inches in diameter) then came up from the pile on an endless chain, ran down the chute, from which it dropped into the vessel. The holds of the vessel were first filled and then the deck load, which was held in place by the cribbing, was placed on board. *The entire loading was done under the direction and supervision of the master of the Nidarholm the District Court so found* (Record, pages 194, 196, 199).

On page 199, Judge Hale said:

> "The proofs show that the master did not intend, or attempt, to delegate his duties with respect to the loading; *he personally supervised and 'bossed' the loading, trimming and securing of the cargo.*" (Italics ours.)

The Circuit Court of Appeals made no special finding on this fact, but the evidence clearly supports the findings of the District Court.

On the first trip, the Captain, who was the servant of the owners, determined when the ship had sufficient cargo and also determined its trim. When the ship was loaded to the Captain's satisfaction she sailed for Portland on her first trip under this charter, where she arrived without mishap; and on her return trip to Murray the stanchions were left standing, and the Captain and Mate of the Nidarholm had every opportunity to examine them (Opinion of District Court, p. 194), and on her arrival back loading was immediately commenced for the second trip.

On the second loading, everything proceeded as on the first until the ship was nearly loaded, when she started to list toward the wharf and act cranky. The stevedore immediately called the Captain, who was then turned in, and he immediately came on deck, and from that time until the loading was completed, the

Captain ordered the cargo trimmed just as he wanted it, and also determined the amount of the cargo, *and insisted, against the advice of the stevedore, on taking more cargo than he had on the previous trip*, and the cargo was heavier (see Opinion of District Court, p. 199; Evidence, Record, pp. 16–18, Q. 49–76).

When the vessel was loaded as the Captain directed she was loaded below her load marks by two and one-half inches.

Under the Captain's orders, considerable cargo was shifted from the starboard side to the port side, so that when the ship sailed there was considerably more cargo on the port side (the side from which the cargo first started to go overboard) than on the starboard side (p. 37, Q. 70; p. 38, Q. 71, 72).

The libellant's foreman suggested to the Captain of the ship that an athwartship lashing be run from side to side opposite the foremast, to help support the cribbing, but the Captain declined or refused to put up such lashing (see Opinion of District Court, p. 194; Opinion of Circuit Court of Appeals, p. 207).

When the loading was completed the ship's docking lines were let go and the ship started on the second voyage (the voyage on which the loss occurred).

ACTION OF SHIP ON LEAVING DOCK AND STARTING TOWARD SEA

When the Nidarholm left the dock, she had a starboard list of approximately five degrees, and as she backed away with her rudder amidships, she would straighten up to an even keel and then gradually drop back to the starboard list. This performance continued until the backing maneuver had been completed; and when the Nidarholm started ahead, she came up on an even keel and slowly listed over to port (Opinion of District Court, p. 188).

It is admitted that the entire loss, as hereinafter mentioned, took place in the smooth waters within the inner harbor of Murray.

Claimant contended in the Court of Appeals that the list in

creased when the vessel got in the shallow water over the bar, but the pilot of the Nidarholm, and the only one on board who was familiar with the location, absolutely denies such fact (p. 59, Q. 56–59).

As the Nidarholm proceeded down the harbor, the port list which she took when she started ahead gradually increased until the vessel was listing from ten to fourteen degrees to port, and each movement of the vessel's helm would cause the list to increase or decrease according to the vessel's course; and shortly following one sharp helm movement, the Nidarholm listed so badly that a part of her deck cargo went over the port side (Opinion of District Court, p. 195). When the weight of this cargo was taken from the port side, the vessel listed sharply to starboard and cleaned off the deck cargo on that side and then continued to roll from starboard to port until the entire deck cargo had been rolled off.

The wood was carried out to sea by an ebb tide that was then flowing, and was practically a total loss.

CAUSE OF ACTION

Upon the arrival of the Nidarholm in Portland, Maine, libel was brought by the Oxford Paper Company to recover the value of the pulp wood, on the ground that the loss was caused by the vessel's unseaworthiness at the commencement of the voyage, by the Captain of the Nidarholm taking on more cargo than the vessel could safely carry, and in not having the cargo properly trimmed. The claimant denied the unseaworthiness of the vessel in one breath, and with another claimed that the cause of the loss was the weak and defective condition of the stanchions, improper position of stanchions, and because the cargo was not properly secured, or *stayed* (see Answer, Record, p. 5).

The libellant contended in the courts below, as it does here.

1. That proper strength of the stanchions, proper placing of the stanchions, and proper staying of the cargo were all necessary to make the ship seaworthy, *and were entirely up to the Captain regardless of who furnished the stanchions or who did the actual loading of the cargo.*
2. That the duty of making a vessel seaworthy is upon the master and owner, and this duty cannot be delegated.
3. That this duty is not in any way lessened by the fact that the libellant furnished the stanchions and did actually load the ship, especially in this case, for everything that the libellant did with reference to the loading was done under the supervision and orders of the master, *whose positive duty it was to have everything shipshape before he permitted his vessel to proceed.*
4. That any loss to the charterer, caused by the failure to have the vessel seaworthy, in all respects, including the proper preparation for and stowing of the cargo, must be borne by the ship owners.

The District Court heard all but two of the witnesses, gave the case great care and thought, made very positive findings of fact, and concluded by holding the ship and her master wholly responsible for the loss.

The Court of Appeals agreed with the District Court that the vessel was unseaworthy, but held that because the libellant furnished the material for, and put up the cribbing to stay the deck cargo, it, too, was in fault for the loss.

BRIEF OF ARGUMENT FOR OXFORD PAPER COMPANY

I

THE CAPTAIN WAS THE SERVANT OF THE SHIP-OWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED.

The charter party, Section 8, reads as follows:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment or agency; and *Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in comformity with Mates' or Tally Clerks' receipts." (Italics ours.)

Thus by the very terms of the charter the master of the ship was the shipowner's servant for the purpose of supervising the loading and stowing of the cargo.

Unless there is an agreement to the contrary, the master is always considered agent of the shipowner, so far as the duty of loading and stowing the cargo is concerned.

In the case of *Harloff, et al.* v. *Barber & Co.*, 150 Fed. 185, on pp. 192, 193, Adams, District Judge, said:

> "'The duty of stowing the cargo in the ship lies on the owner, and on the master as his representative, unless there is an agreement to the contrary. The master ought to be a competent stevedore, and he must see that the stowage is done with skill and care. . . . Moreover, the ship must provide whatever dunnage may be required . . . such as mats, battens, loose wood, etc. These are needful to keep the goods in their places. . . .'

"A chartered vessel in the absence of a special agreement, is required to supply herself with proper fittings for the carriage of lawful cargo."

On this point the District Court, in its opinion in the case at bar, on page 194, said:

"The Captain is presumed to be responsible for the ship without any express provision in the charter; and here there is an express provision in the charter giving him the supervision of the loading."

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

Of this fact there can be no doubt. It was found as a fact by the District Court, and never seriously questioned by the Court of Appeals. On this point the District Court, on page 197, said:

"*In the case before me, the charter affirmatively makes it the duty of the master to supervise the loading and stowing, and the proofs show that he did actually attend to such supervision.*" (Italics ours.)

On page 194 the District Court further said:

"The proofs are clearly persuasive that the captain exercised his duty of supervision."

On page 199 the District Court further said:

"The proofs show that the master did not intend, or attempt, to delegate his duties with respect to the loading; *he personally supervised and 'bossed' the loading, trimming and securing of the cargo.*" (Italics ours.)

And on page 196:

"Upon the proofs I think the master cannot escape liability from the fact that the loading was done by the charterers. It was done under the supervision of the Captain; and the cases make no different rule where the charterers are also the owners, as in the instant case."

In view of these positive findings of fact, supported as they are by the evidence, this court will find that the Captain did supervise and boss the loading and trimming of the ship, and actually ordered more cargo than the stevedore thought wise, and ordered the cargo trimmed to port so that when the ship sailed there was more cargo on the port side than on the starboard (p. 12, Q. 36 p. 16, Q. 49–64).

II

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

This fact is no longer open to dispute. The District Court found it as a fact, saying on page 199:

> "Without going into more details of loading, it appears from the captain's testimony that the ship in calm weather and smooth water, while still within the harbor limits, was listed to her maximum angle of safety, and according to Carmichael, a disinterested witness, she was exceeding her angle of safety by 3 or 4 degrees. At every movement of the helm after the vessel left the dock up to the time of the loss, her list changed materially, and, immediately following a sharp movement of the helm, the cargo went off the port forward deck, abreast the foremast, at the place where the athwartship lashing proposed by the libellant should have been. It seems clear to me, even if the breaking of the stanchions and the lashing was the immediate cause of the cargo going over the rail, *that the list of the vessel was caused by her overloaded condition, over which the Captain must be held by law and in fact to have been responsible.* The Captain seems to have been unduly encouraged by the fact that he got safely to Portland on another trip when the ship had listed even more than on this trip; but he admits that the cargo on this trip was somewhat heavier than on the previous trip."

. . . "From the action of the ship in smooth water, I cannot escape the conclusion that she was unfit to face the perils of the sea along the exposed area of the Atlantic coast from Murray to Portland." (Italics ours.)

The Circuit Court of Appeals agreed with the District Court on this point, and on this question of seaworthiness the Circuit Court of Appeals, on page 207, said:

> "The facts are stated in the opinion of the District Judge and need not be repeated. (26 Fed. (2nd) 92.) His conclusions that the steamer *because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage,—faults for which her master was responsible,—were clearly correct.*"

Therefore both courts agreed that the ship was unseaworthy at the commencement of the voyage, and both courts found the master responsible for this condition.

(a) The loss was the direct result of this unseaworthiness.

The District Court found as a fact that the cause of the loss was the unseaworthiness of the vessel. On page 199 the District Court said:

> "I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

Although the District Court saw and heard all but two of the witnesses, the Circuit Court of Appeals failed to give proper consideration to the findings of fact made by the District Court, and the Circuit Court of Appeals found that the loss was caused partly by the unseaworthiness of the vessel, and partly by the insufficient strength of the cribbing, and the improper stowage of the cargo.

Now we say that if our interpretation of the cases cited on pages 13–16 above is correct, it is wholly immaterial whether

the District Court or the Circuit Court of Appeals is correct on its findings as to the cause of the loss, for we contend that it was the positive duty of the master of the ship, as the agent of the the owners, to make his ship not only seaworthy in hull and machinery, but seaworthy in respect to stowage and staying of the cargo.

That he did not do this is conclusively shown by the fact that the cargo went overboard within the harbor of Murray before the ship had encountered any sea perils.

III

THE SHIP IS RESPONSIBLE FOR LOSS CAUSED BY UNSEAWORTHINESS.

The law is clear that a ship must be seaworthy at the commencement of the voyage, and this means seaworthy not only in respect to hull and machinery, but also with respect to the preparation for and the stowage and staying of the cargo.

In the case of *Lawrence* v. *Minturn*, 17 How. 100, the Supreme Court, on page 115, said:

> "The master is bound to use diligence and skill in stowing and staying the cargo (speaking of deck cargo)."

As already stated, the fact that *the cargo was not properly stayed* is definitely proven by the fact it went overboard while the ship was in calm water in the inner harbor. *Lawrence* v. *Minturn* further holds that the shipowner is not responsible for the loss of a deck cargo brought about by a sea peril, and while the point is not raised in that case no other inference can be drawn from the opinion than that for loss caused by other than sea peril the ship is clearly responsible. In the same case, the Supreme Court, on pages 114, 115, further said:

> "The extent to which we understand them to go, and the law which we intend to lay down, is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no

general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden."

On the same page the court further said:

"Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly staunch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, not until heavy seas were encountered."

Can there be any doubt but the Supreme Court would, under its ruling in the Minturn case, hold this ship wholly responsible for the loss of the deck cargo in smooth water in the harbor, where, as the evidence shows, the vessel was overloaded and unseaworthy, and the loss was the direct result of this condition?

We say further that the case of *Lawrence* v. *Minturn* is direct authority for holding the ship owner responsible for any deck cargo lost through failure of the master to properly stay and secure the cargo from other than perils of the sea.

Referring to the authority of *Lawrence* v. *Minturn*, Judge Ward, speaking for the Circuit Court of Appeals for the Second Circuit, in the case of *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, on pages 20 and 21, said:

"Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship wil be excused. *Lawrence* v. *Minturn*, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no sea peril is encountered.

It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount or the stowage of the deck load alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deck load or that surveyors certified that the ship could do so safely No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

And on page 20, Judge Ward further said:

"The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deck load and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deck load in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The District Judge held that the expenses connected with the falling of the deck load at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deck load and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deck load. *The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deck load, a thing which it was the duty of the master to prevent.*" (Italics ours.)

The above case is in many respects on all fours with the case at bar, and the opinion of the Circuit Court of Appeals in the case at bar is in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Olsen case.

In the case of *The Seguranca*, 250 Fed. 19, the Circuit Court of Appeals for the Fifth Circuit (construing a charter party, using practically the identical language as the charter in this case where it related to the Captain's supervision of the loading), stated that it was immaterial what caused the tenderness of the ship, whether it was overloading, or improper stowage of the cargo, because the master was responsible in the final windup to have his ship seaworthy on going to sea. And the court in that particular case held that the cause of the improper stowage was due partly to the master of the ship, and partly to the stevedore, as the Court of Appeals did in the case at bar, but the court in *The Seguranca* held the ship *solely* responsible for the loss.

On page 22, the Court of Appeals said:

> "The appellant claimed as an offset damage alleged to have been suffered by him because of improper loading of the Seguranca by the stevedores employed by the appellee as charterer, consisting in the expense of removal of part of the cargo and loss of revenue, claimed to have been due to shortage of cargo due to improper loading. *The evidence is conflicting as to whether the admitted tenderness of the ship after it was loaded was due to improper stowage of the cargo or to the alleged crankiness of the ship herself.* We find it unnecessary to determine as between these causes. Section 15 of the charter party provided that:
>
> " 'The charterers or their agents shall provide and pay a stevedore to do the stowing of the cargo under the supervision of the master.'
>
> "One Tracy was employed by the charterer to do the loading. His testimony is to the effect that the loading was done in a manner known to and approved by the

master, and that additional cargo of resin, a subject of complaint by the appellant, was put on the ship only after the intention to do so was made known by Tracy to the master, and that the master made no objection, until after it was loaded on the ship, and that the first objection or protest made by the master was after the ship was loaded and when a list became apparent. It is true that the evidence of the master, Dixon, is partly in conflict with Tracy's. The District Judge, after hearing the evidence of both, came to the conclusion that any improper stowing of cargo was due to the joint fault of the stevedore, Tracy, and the master, Dixon, and under the terms of the charter party, it was made the master's duty to supervise the stowing of the cargo. *Under these circumstances, we agree with the conclusion reached in the District Court that the appellant should take nothing by reason of this offset.*" (Italics ours.)

In the case of *The Dana*, 190 Fed. 650, the cargo was furnished by the charterer, and the amount put aboard was also determined by the charterer's agent, still the court held the ship responsible because the Captain did not refuse or reject to carry the amount offered, nor did he object to the way in which the load was placed on his vessel. The court held that the master held his vessel out as being able, loaded as she was, to satisfactorily carry the cargo to its destination.

On page 653, the court said:

"It appears that the load was furnished by the libellant and that the quantity offered was also determined by the libellant's agent, while the captain of the vessel only supervised, in a general way, the placing of the cargo, and indicated the quantity which he would undertake to carry. *Here, again, the master's actions were of a negligent character. He did not refuse or object to carry the amount offered, nor did he object to the way in which the load was placed upon his vessel. So it must be assumed that he undertook the*

voyage with the cargo in the condition in which it was put upon his vessel, and therefore that the vessel was held out to be seaworthy, to the extent of being able to undertake what her master undertook to do with her." (Italics ours.)

In the case of *Hamilton, et al.* v. *United States*, 268 Fed. 15, on page 21, the court said:

"Inherent in the shipping articles was the absolute obligation of the owners and operators to see that the vessel was seaworthy. To be seaworthy the vessel must be tight, staunch, and strong, and so equipped and the cargo so stored as to resist all ordinary action of the sea."

Poore on Charter Parties, Section 3, reads as follows:

"The seaworthiness of the ship is under the absolute control of the master. Neither he nor his owners are excused because the charterers load the ship in such a way as to make her unseaworthy."

IV

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS AND BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP, THUS PLACING EXCESSIVE STRAIN ON THE CRIBBING.

The District Court found as a fact that the stevedore suggested the placing of an athwartship lashing running from the foremast to the stanchions, on each side, as shown in Exhibit 5, on page 187 of the record (note there are two pages 187). The District Court further found that the Captain declined to put such a lashing on.

On this phase of the matter, the District Court, on page 194, said:

> "It appears in evidence that the superintendent in charge of the plant at Murray recommended to the master that he put an athwartship lashing at the foremast, the same to go around the foremast and be made fast on the stanchions opposite the foremast. *This lashing the Captain refused to use on his first trip. It appears that the suggestion was renewed by the libellant's superintendent on the second trip and the Captain again refused to put it on: and it was on this trip that the loss occurred. It appears that on the third trip the lashing was put on.*" (Italics ours.)

Regarding the placing of this same lashing the Circuit Court of Appeals, on page 207, said:

> "He (the Captain) was consulted about the lashings and expressed the opinion that one leading from side to side at the foremast was unnecessary."

The finding of fact by the District Court should be conclusive, especially supported as it is by the evidence (p. 35, Q. 27–29). The cargo first started to go directly where this lashing would have been had the Captain not declined to use it. This alone might account for the loss if the list was caused by the shallow waters, as the owners want this court to believe.

(a) Unusual Strain Placed on Cribbing by Unseaworthy Condition of Ship

Let us assume, for the purpose of this argument, that the entire loading, up to the morning on which the ship sailed, was done wholly by the charterer without any suggestions or information from the master. Let us further assume, for the purposes of argument, that the charterer furnished the cribbing without any information from the master. It is clear that before loading was completed, the ship started to act cranky. That the stevedore became disturbed, and called the Captain at 3.50

in the morning. The Captain came on deck, ordered the loading stopped for a few minutes, tested the ship's tanks, then, against the advice of the stevedore, ordered more wood, 15 cords aft and 5 forward, and ordered the wood trimmed to port to overcome the starboard list (pp. 16–18, Q. 49–74). *Certainly the charterer* (no matter what his responsibility may have been heretofore) *had a right to rely explicitly on the judgment of the Captain as to whether or not the vessel would take more load, and where the load had to be placed.*

In the case of *The Kaupanger*, 241 Fed. 702, on page 705, the court said:

> "When Gilbert consulted with the master and in substance got his assurance that he could fill the ship on top of the stowage as it stood, he had the right to sound advice, which would have told him that she needed more ballast. The master's unsound advice was a fault, for the loss through which the owner is responsible to the extent of the subsequent failure to fill up to her capacity."

The strain placed on the cribbing by this cranky and unseaworthy ship was excessive, and even assuming that it was the charterer's duty and responsibility (which we deny) to furnish cribbing of sufficient strength, certainly the charterer could not be called upon to furnish cribbing that would withstand the strain placed upon it by an unseaworthy ship.

(b) Ship Was Actually Overloaded

The Nidarholm was down below her load marks and therefore actually had on more cargo than she was built to carry (Opinion of District Court, p. 195). See the case of *Lawrence* v. *Minturn*, *supra*, p. 17, where the Supreme Court held the vessel in that case was not overloaded.

V

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS.

No proof is necessary to show that if the cargo had been properly loaded and stayed and the ship had been seaworthy, the cargo would not have gone overboard in the calm waters of the inner harbor as it did in this case. If our interpretation of the cases quoted above is correct, to the effect that it was the duty of the Captain to see that this cargo was properly stowed and his vessel seaworthy, and if the word *stayed*, in the opinion of *Lawrence* v. *Minturn*, *supra*, means stayed (held in place against all but perils of the sea), it must follow as a conclusion of law that the ship was solely responsible for this loss.

We therefore contend that on the facts as found by the Circuit Court of Appeals, regardless of the facts found by the District Court, the rulings of law made by the Circuit Court were erroneous and in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Olsen case, *supra*, page 18, also contrary to the ruling of the Fifth Circuit in *The Seguranca*, *supra*, page 20, and directly contrary to the rulings of the Supreme Court in the case of *Lawrence* v. *Minturn*, *supra*, page 17.

CONCLUSION

The cases cited by the proctors for the Steamship Nidarholm such as the *Thomas P. Beal*, 11 Fed. (2nd) 49, *Oakley C. Curtis*, 4 Fed. (2nd) 979, and certain others are not in conflict with libellant's contention, but neither are such cases in point—those cases are practically all cases where the cargo was damaged, because of the place on the ship where it was stored, or because the containers were defective. In none of those cases was there

any question of the ship being cranky, or the cargo being lost by rolling overboard, whereas in the case at bar, both courts held the Nidarholm unseaworthy and the pilot said she could never reach Portland loaded as she was (p. 60, Q. 71–73).

Respectfully submitted,

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Oxford Paper Company.

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In the

Supreme Court of the United States.

October Term, 1930.

No. 58.

OXFORD PAPER COMPANY,
PETITIONER,

v.

STEAMSHIP "NIDARHOLM," A. S. NIDAROS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

ROBERT E. GOODWIN,
Proctor for Respondent.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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OCTOBER TERM, 1930.

No. 58.

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STEAMSHIP "NIDARHOLM," A. S. NIDAROS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Maine (R. 186) is reported in 26 Fed. (2d) 92. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 206) is reported in 34 Fed. (2d) 442. A second opinion of the Circuit Court of Appeals on petition for rehearing (R. 208) is reported in 36 Fed. (2d) 227.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on August 21, 1929 (R. 209), and the order denying the peti-

tion for rehearing on December 11, 1929 (R. 209). Petition for certiorari was filed March 5, 1930. Certiorari was granted April 28, 1930 (R. 210). Jurisdiction is conferred upon this Court by section 240 (*a*) of the Judicial Code as amended by Act of February 13, 1925.

Statement of the Case.

Nomenclature.

Oxford Paper Company, libellant and cross-respondent in the District Court, appellee in the Circuit Court of Appeals, and petitioner in this Court, is herein referred to as the "Charterer," and A. S. Nidaros, a Norwegian corporation, claimant and cross-libellant in the District Court, appellant in the Circuit Court of Appeals, and respondent in this Court, is herein referred to as the "Shipowner." The S. S. *Nidarholm* is referred to as the "Ship."

The Facts.

The facts are stated at length in the Charterer's brief, and need not be duplicated herein, but certain inaccuracies in the Charterer's statement and certain additional facts of importance will be commented upon.

1. The *Nidarholm* is a Norwegian steamship, approximately 300 feet long and 43 feet wide. She has a flat bottom and perpendicular sides. She is a well-decked ship. Her bridge separates the two well decks, and is located about one third of her length from the bow (R. 147, 148, 149, 158).

2. The reference in the Charterer's brief (page 8) to the stranding of the Ship before she reported for taking cargo at Murray, Nova Scotia, is unsupported by any evidence in the record. The Ship's log was not in evidence. The only reference in the testimony to a stranding was the statement by the witness Harvey that he had information that the Ship had stranded prior to her reporting for cargo at the Charterer's pulp plant in Nova Scotia (R. 71). The opinion of

the District Court makes reference to a stranding, in spite of the absence of testimony in support of it (R. 187).

3. The paragraph on page 8 of Charterer's brief, entitled "Preparations for Loading," is not clear. It gives the impression that the construction of the cribbing was undertaken by the Ship and not by the Charterer. As a matter of fact, the work was in charge of one McKnight, a civil engineer employed by the Charterer (R. 32). Under his direction the fir or spruce stanchions supplied by the Charterer were set in place around the Ship's well decks and lashed at the rail (3 or 4 feet above the deck) and at the butts, with twelve-thread hemp rope, also supplied by the Charterer. These lashings were regarded by the Charterer as only "temporary" expedients to hold the stanchions in place until the deck cargo was loaded (R. 46). Lashings of wire cable furnished by the Ship *ex gratia*, were then bound around every third or fourth stanchion, and made fast to ring-bolts in the hatch coamings. Although there were 80 stanchions in all (about 20 on each side of each well deck), there were only 24 of these wire rope lashings, making about 6 on each side of each well deck (R. 171). These wire lashings were attached by the Ship's crew, under the supervision of McKnight. The Charterer also nailed to the outboard facings of the stanchions, at a point about 10 to 11 feet above the deck, a strip of heavy planking about 8 inches wide and 3 inches thick. The cribbing was completed by nailing one inch boards to the outboard facings of the stanchions (R. 33). The master of the Ship was unfamiliar with such structures, and left it to the Charterer, and it does not appear that the master was consulted at all about the dimensions or material of the stanchions and stringers, or the way in which the crib was put together (see C.C.A. Opinion, R. 207).

The athwartship lashing referred to (Charterer's Brief, p. 8) was suggested when the cribbing was being erected *before the first trip* (R. 36). Such a lashing was not again

mentioned or suggested when the Ship was being loaded for the second trip—the one on which the loss occurred (R. 36, 161).

4. When the Ship left the dock at Murray on her first trip, she behaved in the same manner as on the second trip, when the loss occurred. On both occasions she left the dock with a 5-degree list to starboard, but shifted over to 5 degrees to port when she made the turn in the stream (R. 137). On the first trip the crib stanchions held and the cargo was safely transported to Portland. On the second trip the crib stanchions gave way, and the loss occurred.

5. The action of the Ship from the time she left Murray on the second trip (when the loss occurred) until the cribbing broke, must be considered in detail. Both the Charterer in its brief (page 11) and the opinion of the District Court (R. 188) give the impression that the list of the Ship was materially greater than 14 degrees at the time the cribbing broke.

The master of the Ship testified that she was listing 10 degrees at that time, and he based his testimony upon an actual reading of the clinometer (R. 140). Carmichael, the pilot and the Charterer's only witness on this point, thought the list might have been as much as 13 or 14 degrees, although he did not look at the clinometer (R. 62). Viewing the evidence in the aspect most favorable to the Charterer, it cannot be found that the Ship was listing more than 14 degrees at the time the cribbing broke.

6. The first mishap was the breaking of the upright crib stanchions. The master testified that he had heard "a crack" (R. 140), as if "something woody was breaking up" (R. 164), and that immediately thereafter all the crib stanchions on the *port side of the forward well deck* broke, and the deck cargo there went overboard (R. 140). Thus it stands, as perhaps the primary fact in this case, that the stanchions, furnished by the Charterer, broke when the Ship listed to a point somewhere between 10 and 14 degrees.

7. It is undisputed that all of the 80 crib stanchions supplied by the Charterer broke (R. 172), while not more than 11 out of 24 wire rope lashings broke (R. 45). The first officer of the Ship, who personally examined the lashings after the accident, testified that only 7 out of the 24 were broken (R. 171) and that none of the wire lashings on the port side forward were broken (R. 175).

8. The Charterer's witness, McKnight, testified that the butts of the crib stanchions were found, after the loss, to have been pried inboard about 2 feet or more, and that all of the butt lashings were broken. He also testified that the butts of the crib stanchions on the port side forward (where the first break occurred) were pried further inboard than elsewhere (R. 42, 44).

9. The Ship made another trip under this charter-party after the trip upon which the loss occurred (R. 145). On this third trip a new cribbing was erected by the Charterer, and the stanchions used in this new cribbing were about twice as large as those which broke upon the second trip (R. 176). This time the Charterer also bought and used chains to replace the wire cable lashings that had been broken, but again used such of the wire lashings as had not been broken (R. 52).

10. All the witnesses, both for the Charterer and for the Shipowner, were in agreement that never, prior to the time when the first section of cribbing broke out, did the Ship list as far as she ordinarily might have been expected to roll from the normal action of the sea during the course of the voyage she was then beginning. The Charterer's witness, Carmichael the pilot, gave it as his opinion that the Ship should have been prepared to go from 20 to 30 degrees off the perpendicular upon such a voyage (R. 63). Even the Charterer's expert witness, Bennett, admitted that the cribbing should have been prepared to withstand a departure from the perpendicular of at least 20 degrees, with a safety factor of 6 per cent or 7 per cent (R. 116).

11. The testimony of the master and first officer of the Ship was taken by deposition, and not in open court (R. 12, 132-178). The Shipowner presented no other witnesses except one Michelsen, who testified in open court, as an expert, that it is common for lumber ships with deck loads to carry a list (R. 117). All of the Charterer's witnesses testified orally before the judge of the District Court (R. 11-116). This point is commented upon, since counsel for the Charterer appears to attempt to support the findings of the District Court as against the findings of the Circuit Court of Appeals (where they differ), on the ground that the District Court heard and saw the witnesses in person (Charterer's Brief, pp. 12, 16, 23). Inasmuch as there is little, if any, material conflict respecting the facts, the differences in the findings as between the two Courts below depend not upon the weighing of conflicting testimony, but rather upon a proper understanding of what was said. Several instances will be pointed out where findings by the District Court are not supported by the evidence.

Assignments of Error.

This case is before this Court as a Court of Appeal in Admiralty, and is therefore heard *de novo*. The entire case is opened up with the same effect as if certiorari had also been granted at the instance of the respondent Shipowner, who is therefore entitled to ask this Court for affirmative relief.

Yeaton v. *United States*, 5 Cranch, 281; 3 L. Ed. 101.

Irvine v. *Hesper*, 122 U.S. 256; 30 L. Ed. 1175 (1887).

Duche & Sons v. *Schooner Twohy*, 255 U.S. 77; 65 L. Ed. 511 (1921).

The respondent (Shipowner) therefore insists that the petitioner (Charterer) should have been held solely at fault, and assigns as error the ruling of the Circuit Court of Appeals that the fault was mutual and that the damages should be divided.

Questions Presented.

The questions of law presented are:

1. Whether a shipowner is in any way liable for the loss of a deck cargo of pulp logs stowed in a wooden cribbing erected by a charterer on the ship's deck, when the loss occurred by reason of the breaking out of the cribbing, due to its structural weakness, and the charter-party provided that the cargo should be loaded and stowed by the charterer under the supervision of the master of the ship;

2. Whether a ship is "unseaworthy," in the proper legal sense of the term, when her deck cargo is endangered although the ship herself is in no danger.

3. Whether, if the shipowner is liable, the charterer who built the cribbing and stowed the cargo in it is also liable, so as to cause the damages to be divided.

Summary of Argument.

The Ship was seaworthy in all respects when she was delivered to the Charterer.

The responsibility for loading and stowing her rested upon the Charterer, under the terms of the charter-party. The Charterer prepared her to receive cargo, and loaded and stowed a deck cargo upon her so insufficiently and negligently that it broke out and went overboard before the Ship had been subjected to half the normal strain to be expected upon a voyage like the one she was then beginning.

Since the Ship was fit to receive cargo before the loading began, and since she herself was not in danger at any time, she cannot properly be termed "unseaworthy."

The loss was therefore due to the negligent way in which the Charterer performed its duty of loading and stowing, and particularly to the weakness of the cribbing which retained the deck cargo.

Under the charter-party the master of the Ship was the agent of the Charterer as to all matters in connection with cargo, so long as the safety and navigability of the Ship was not concerned. Therefore, any action of the master with respect to the loading and stowing of the deck cargo was taken on behalf of the Charterer, and for it the Charterer is responsible.

Argument.

I.

The Ship was Seaworthy.

The term "unseaworthy" was used by both the Circuit Court of Appeals and the District Court with reference to the Ship, and the Charterer throughout its brief seems to regard this finding as conclusive of liability upon the Shipowner.

But we contend that upon undisputed facts the Ship herself was "seaworthy" within the proper meaning of that term, because neither she herself nor any part of her, nor the cargo stowed in her holds, was ever in any danger of loss, injury, or destruction. The deck cargo was badly stowed by the Charterer and it alone was in danger. It alone was lost. Therefore we contend that this is not a case of unseaworthiness, but merely of bad stowage done by the Charterer.

This distinction is clearly brought out in a recent case in the House of Lords.

> See *Elder Dempster & Co.* v. *Peterson-Zochonis & Co.*, [1924] A.C. 522.

In that case the plaintiff had chartered a deep ship, with no 'tween decks, for use in the West African trade. The Charterer loaded her with palm oil in barrels, on top of which he stowed large quantities of palm kernels in bags. The palm kernels were too heavy, the barrels containing the oil were crushed, and the oil was lost. The bills of lading issued by the ship to the plaintiff (charterer) provided that the ship should not be liable for bad stowage. To sustain a claim against the ship and her owner for the loss of the oil, in the face of this clause in the bills of lading, the charterer sought to show that the ship was "unseaworthy." The trial Court ordered judgment for the plaintiff, and this ruling was affirmed by the Court of Appeal. The judgment was reversed in the House of Lords, which held that it was solely a question of bad stowage. Lord Sumner said, at page 561:

> "Unseaworthiness is a quality of the ship, however arising. . . . Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo."

The same fundamental distinction is made by the Court in—

A. E. Reed & Co., Ltd., v. *Page, Son, &c., Ltd.* (Court of Appeal), [1927] 1 K.B. 743.

In that case the plaintiff had hired the defendant, a lighterman, to transport a cargo of pulpwood from a ship anchored in the stream. One of the lighters employed by the defendant for the work was overloaded, and sank at the ship's side. The plaintiff sued both the lighterman and the stevedore. The lower Court exonerated the stevedore,

but held the lighterman liable on the ground that the lighter was "unseaworthy" at the beginning of her voyage. These rulings were affirmed in the Court of Appeal. The language of Scrutton, L.J., is very significant. Referring generally to the relations between the ship and the cargo, he says:

> "On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of 'cargo worthiness', is when cargo is commenced to be loaded. . . . This limitation of the warranty of cargoworthiness is expressly made, because negligent stowage of a seaworthy ship is something happening after the warranty of cargoworthiness has been complied with, and, so long as the negligent stowage does not make the ship unseaworthy as a ship, does not affect a warranty which has already been complied with."

Elsewhere in his opinion (at page 755) he said, referring to the case of—

Wade v. *Cockerline*, 10 Com. Cas. 115 (1905)—

> "The ship was quite fit as a ship to carry the cargo she had on board if properly stowed; the bad stowage did not make the ship unfit as a ship, but did endanger the cargo."

In the case at bar the warranty of seaworthiness in the charter-party was satisfied when the Shipowner produced a ship which was fit to carry the cargo in question. Any injury to cargo which thereafter arose because the loading and stowing was improperly done is not to be attributed to the Ship unless the defective stowage rendered the Ship herself unsafe.

Elder Dempster & Co. v. *Peterson-Zochonis & Co.* (*supra*).

A. E. Reed & Co., Ltd., v. *Page, Son, &c., Ltd.*, (*supra*).

The necessity for making this distinction does not arise in cases where, for one reason or another, the duty of loading and stowing rests upon the vessel, as in the case of *Harloff* v. *Barber*, 150 Fed. 185, cited by the Charterer. In such cases the vessel is liable for the loss of cargo, regardless of whether or not she was in actual danger herself or whether the sole fault lay in the way the cargo was stowed upon her. Also the term "unseaworthy" is properly used in those cases which are examples of bad stowage which endangers the ship itself. A typical example of such a case is *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, also relied upon by the Charterer.

But when a situation arises like that in the instant case, where responsibility for loading and stowing is expressly placed upon the charterer by the terms of the charter-party, it is essential to determine the precise effect of the bad stowage. If that improper stowage goes so far as to endanger the safety of the ship herself, she may properly be called "unseaworthy," and if that unseaworthiness is the cause of loss or damage to the cargo, the argument can be made with considerable force that the owner of the ship should stand the loss. This, in effect, was the holding of *Olsen* v. *United States Shipping Co.* (*supra*). But if the improper stowage only jeopardizes the cargo, and does not affect the safety of the ship herself, we have, as was said in the Elder Dempster case, "bad stowage and nothing more."

We submit that the case at bar presents an instance of bad stowage only. A careful reading of the record compels the conclusion. To demonstrate this we do not have to rely upon the testimony of the master of the Ship (R. 146) to the effect that his vessel was seaworthy. Bennett, the expert naval architect whom the Charterer produced as a witness, admitted that the Ship herself was never in danger. Bennett's testimony is long and technical. He had never seen the Ship and he built up his testimony upon computations

which he made from plans of the vessel which he claimed he had procured in New York, and from reading the testimony as to how the Ship behaved on the occasion in question (R. 76, 100). His computations were based upon the location of the center of gravity of the Ship when she was loaded for the voyage in question, yet he admitted that he fixed this point by estimate or guesswork (R. 111, 112, 113).

The substance of Bennett's testimony, so far as material to the issues raised on this record, is contained in the following excerpts:

(R. 91:)

"Q. 81. Now, Mr. Bennett, assuming that this same ship has proceeded down the harbor, and as she proceeded down the harbor the list increased until it got somewhere around ten degrees, or slightly over, whether or not having a port list of ten degrees and all other conditions being the same as you have heard, and read, whether or not you should consider the steamship Nidarholm in that condition a seaworthy vessel to proceed to Portland, Maine? A. In my opinion she certainly was not a seaworthy vessel.

"Q. 82. And will you please tell us why not? A. If the vessel starts out at the beginning of her voyage with a ten degree or more list, and that list is going to increase as it must in the course of consumption of feed water and fuel; coupled with the fact that the maximum righting arm of that vessel is reached at the draft stated in the testimony, when she was inclined about ten degrees; that she would probably meet with beam winds, the waves and the way; in my opinion she was in no condition to start out upon even a short trip."

(R. 109:)

"XQ. 119. Now in regard to her stability—the stability of the ship—and your various assumptions relat-

ing thereto; what have you assumed as to the condition of her tanks? A. I have assumed that her tanks were all filled.

"XQ. 120. And with regard to her coal? A. As a matter of fact, the condition of her tanks and coal didn't really enter into it. My claim that the vessel was unstable is based on the action of the vessel itself, at the dock, when she was leaving the dock, and as she proceeded down the harbor. The statement in the testimony to the effect that all the tanks were filled, merely shows me that she had no method at all in which she could overcome her instability. To illustrate: Certain lumber-carrying vessels that leave Gray's Harbor, on the Pacific coast, have to cross the bar. They are permitted to cross that bar with certain double bottom tanks not filled, in order to lighten them up to cross the bar with three or four degrees inclination, providing that immediately they cross the bar they fill those tanks. Now, those empty tanks are what you may call reserve stability. That is, you add that weight to the bottom there, which counteracts the center of gravity of a lumber cargo. The testimony as to the Nidarholm is to the effect that all the tanks were filled. Therefore, she had no possible means at all of bettering her stability condition when she left port, but the consumption of her feed water and of the coal was going to make worse conditions of stability as the voyage proceeded. Now, the amount of water and of coal had nothing to do with it at all, in coming to my opinion. It was the action of the ship itself."

(R. 103, 104:)

"XQ. 72. Now, you say that this ship could go over only eleven and a quarter degrees safely? A. No, sir. I said it would go over eleven and a quarter degrees when it reached its maximum righting arm.

"XQ. 73. *How far could it go over safely?* A. *Thirty to forty degrees, perhaps.*

"XQ. 74. *Would it have to go that far to withstand the ordinary perils of navigation?* A. *It wouldn't.*

"XQ. 75. If a ship the size of the Nidarholm gets in a heavy sea, how far will she roll off the perpendicular? A. There are so many conditions governing that, I really can't answer. Heavy wind conditions, and synchronous rolling, and waves; all kinds of conditions.

"XQ. 76. Well, if you are designing a ship that is to cross the ocean, isn't it necessary to design her so that she can roll at least thirty degrees safely? A. Yes.

"XQ. 77. Any more than thirty degrees? A. Depending on her freeboard.

"XQ. 78. What is freeboard? A. Freeboard is the amount of the side of the ship which is above the water level.

"XQ. 79. The amount of the side of the ship which is above the water-line? A. Yes. The height of the side of the ship.

"XQ. 80. And in a ship like the Nidarholm, where did you measure that? A. At the midship point, which is half way between the stem and the stern.

"XQ. 81. And what is the upper limit of your measurement? A. The statuary deck line. The weather deck line. In the Nidarholm it was the upper deck.

"XQ. 82. How much freeboard did you have on the Nidarholm? A. Four feet and four inches is allowed by the register during the summer months.

"The Court: That is, freeboard from the deck up; or from the water line up?

"A. From the deck line; or, from the water line up.

"XQ. 83. The distance between the deck and the water line? A. Yes, sir. It really is based on the amount of reserved buoyancy that is required to make a ship safe.

"XQ. 84. I understand you to say that the amount of freeboard governs the distance which the vessel may roll, before she reaches her maximum righting-arm? A. Yes, sir.

"XQ. 85. And I understand you to say that cargo has no effect upon that? A. No, sir.

"XQ. 86. What do you mean, 'No, sir'? Is that right, or didn't I understand you? A. That is right. It has no effect."

(R. 114, 115, 116:)

"XQ. 153. You said this Nidarholm would roll thirty degrees? A. Yes.

"XQ. 154. But she wouldn't keep her deckload? A. No.

"XQ. 155. What did you mean by that? A. Why, she would shoot it overboard.

"XQ. 156. Supposing the lashings and stanchions had been strong enough to keep it. Do you mean that the stanchions would break and let it go overboard? A. No. I mean she would have shot it over the top of the wooden bulwarks.

"XQ. 157. But you think she could have rolled thirty degrees safely? How do you think she could have rolled thirty degrees safely? A. If she had discharged that part of the cargo which she would have done.

"XQ. 158. Well, assuming that she didn't discharge it? A. I don't think she could.

"XQ. 159. How far do you think she could have gone over safely, without discharging part of it? Or rather, without discharging any of it? A. Probably fifteen to eighteen degrees.

"XQ. 160. On a ship like the Nidarholm, leaving for the trip like she did leave for, how much of a list or a roll should the cargo be secured—the deck cargo—be

secured to withstand? A. Probably ten degrees. Or fifteen to twelve degrees, I will say; each side of the center. Probably more. Probably fifteen degrees each side of the center.

"XQ. 161. And that means in a trip like the Nidarholm undertook you need not foresee any more than a fifteen degree departure from the perpendicular? A. No, I don't understand that.

"XQ. 162. Well, what is your margin of safety, if you are loading a deck cargo; how much of a slant off the perpendicular have you got to be prepared to meet? I am not speaking of stability now, but I am speaking of a ship either through a list or rolling from the sea—A. I understand. Why, the bulwarks in a ship like the Nidarholm should be sufficiently strong to take care of any ordinary roll that is liable to be encountered. And it is very seldom that you encounter rolls of more than twenty degrees each side of the center.

"XQ. 163. Well, does it follow, then, that if you were in charge of securing the deckload of a vessel like that that you would so secure it to withstand twenty degrees from the perpendicular? A. No, sir. You have something in mind. All construction has factors of safety in it, and when you say you construct a bulwark to prepare for a rolling of a ship twenty degrees each side of the center, nobody means that beyond twenty degrees the thing is going to damage; the thing is the factor of safety. When you get beyond that you are getting into conditions that you are going to discharge your cargo. So that while the actual load on the side may increase theoretically, it is going to decrease practicaliy because you are losing it overboard. One of the things we have to contend with is this—it is a greater menace in ships like this than the ordinary lumber carrying ship—and that is when water gets on deck; of floating the cargo.

"XQ. 164. If you were called in, as a consulting naval engineer, to advise how much pressure the stanchions must be prepared to hold in a case like the Nidarholm,—and when I say stanchions I mean stanchions and lashings—side retainers—what would be your answer, in terms of degrees off the perpendicular? A. If I was called upon to design bulwarks, without any prior experience of people who had operated these things, but designed from an engineering point of view purely, I would figure on a twenty degree roll each side of the center line of the ship, and then proportion the various structures to meet that, with probably a five to seven and a half percent factor of safety.

"XQ. 165. Twenty degrees, plus five to seven and a half degrees fact or safety? A. Not degrees. Percent.

"XQ. 166. Percent? A. Yes, sir."

The following testimony is also enlightening, when considering the several diagrams and plans which Bennett used to support his theories (R. 102):

"XQ. 61. Well, you have that picture drawn of her; that is drawn just from your conception of the situation as shown by the testimony. How far in from the rail is the center of gravity of that load? A. I have drawn this sketch in the worst possible condition I could conceive. Frankly, I think it was very much better than that. But I have pushed that outboard, and that load is as far outboard as possible, and the center of gravity there comes approximately five feet in from the inboard edge of the stanchions."

Bennett's testimony summarized, and taken in the aspect most favorable to the Charterer, goes no further than to say that the Ship, as loaded when she left her port of loading on the trip in question, would not have carried her deck

load in safety to Portland. Bennett never went so far as to say that the Ship herself was in danger at any time. In fact he admitted that she was not in danger (R. 114, 115).

There is one statement in the opinion of the learned District Judge to which reference must be made. He misunderstood or confused the testimony as to the safety of the Ship, for he says (R. 195) that while still within the harbor limits the Ship was exceeding her "angle of safety" by 3 or 4 degrees, according to the testimony of the pilot Carmichael. But Carmichael never testified on this point at all. He did testify that the Ship was listing 13 or 14 degrees at the time when the cribbing broke and the deck cargo went overboard (R. 62), but the technical term "angle of safety" was used only by Bennett, and he testified that the Ship could have heeled 30 or 40 degrees without danger to herself (R. 103). It seems evident that the learned Judge of the District Court confused the terms "maximum righting arm" and "angle of safety," both of which were injected into the case by the expert, Bennett. The District Court quite evidently took Bennett's testimony that the Ship exceeded her "maximum righting arm" to mean that she went beyond her "angle of safety." Of course, this was not the case, and Bennett's testimony carefully distinguishes between the two. Undoubtedly the learned District Judge was greatly influenced in his view of the case by this fundamental confusion of terms. It is difficult, for this reason, to place any weight at all upon the findings of the District Court on this point.

It is submitted that the testimony of the Charterer's own witnesses goes no further than to support the following propositions:

(*a*) The Ship should have been so loaded and stowed that she could safely heel over between 20 and 30 degrees, from any cause whatever (R. 116, 63).

(*b*) When the cribbing holding the deck cargo broke out, the Ship had only just reached, or at the most slightly exceeded, her "maximum righting arm" (R. 88, 62, 140).

(c) That the Ship could have heeled from 30 to 40 degrees without danger to herself, although before reaching such an angle her high deck cargo would have been sluiced overboard (R. 103, 114).

The fitness of the Ship herself for the venture is conclusively established by the fact that she made three voyages loaded with pulp wood from Murray to Portland without mishap of any kind except upon the single occasion when the crib structure erected upon her deck by the Charterer gave way.

II.

The Proximate Cause of the Loss was the Weakness of the Cribbing Built by the Charterer.

In the case at bar the Charterer asserts that the Ship was so overloaded that she was "unseaworthy." It has been shown above that this is not so, if the term "unseaworthy" is given its proper meaning. But even if it were so, it does not aid the Charterer in its attempt to impose liability upon the Shipowner unless this condition of unseaworthiness was the *proximate cause* of the damage to the cargo.

Republic of France v. *French Overseas Corp.*, 277 U.S. 323; 72 L. Ed. 901.

The Europa, [1908] P. 84.

Baumwoll v. *Gilchrest* (Court of Appeal), [1892] 1 Q.B. 253.

Kish v. *Taylor*, [1912] A.C. 604.

The Christel Vinnen, [1924] P. 61.

Rosenberg Bros. v. *Atlantic Transport Co.*, 25 F. (2d) 739.

Elder Dempster v. *Peterson-Zochonis & Co.*, [1924] A.C. 522.

It is plain from the record that the proximate and efficient cause of the loss was the fact that the cribbing, con-

structed by the Charterer, was not strong enough to hold the cargo which the Charterer put in it.

To constitute a proximate cause creating liability for negligence, the injury must have been the natural and probable consequence of the negligent act or condition. When the act is done or the condition created, it must have been apparent to a reasonably prudent man that the injury would probably occur as a result of his negligence.

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *Samuel Calhoun*, 213 U.S. 1; 53 L. Ed. 671 (1908).
> *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469; 24 L. Ed. 256 (1877).

When the cribbing broke and spilled the deck cargo overboard the Ship had departed from the perpendicular not more than 13 or 14 degrees. This was the estimate of the pilot, who was produced as a witness by the Charterer (R. 62). The master, who based his testimony upon his reading of the Ship's clinometer at the time the accident occurred, said that the list was 10 degrees (R. 140). All of the witnesses who testified on the point agreed that a ship might normally be expected to heel over from the perpendicular, by rolling in a normal seaway, at least 20 degrees, and possibly 30 degrees (R. 63, 116). It follows that any experienced stevedore charged with the duty of loading and securing the deck cargo put on the Ship upon the trip in question would have recognized it as a part of his duty to load and stow that cargo in a way which would resist this normal strain.

But the cribbing broke out before the Ship had rolled one half as far as she might normally be expected to roll. Whether this was due to the insufficiency of the stanchions, or to the fact that the lashings at the butts were not properly secured for the second trip, thus allowing the whole structure to take an outboard slant above the rails during the loading, is immaterial. Whichever was the cause (and

these seem the most likely explanations of the loss), it arose from a matter over which the Charterer alone exercised supervision and control, viz., the character and construction of the cribbing.

In addition to the certainty that the Ship would roll somewhat, due to the normal action of the sea, it was apparent in this case, when the Charterer completed the loading, that the Ship would carry a list. A list was to be expected in a ship carrying a high deck cargo. The master and Captain Michelsen both testified to this effect (R. 122, 123, 143, 144).

The Ship had carried a list on the first trip (R. 136, 137). She actually had a list as she lay at the dock before the second trip was begun, but neither the stevedore, McAulay, nor the engineer, McKnight, suggested that any cargo be taken off, or that the cribbing be strengthened in any way. The master of the Ship was satisfied as to the safety of his vessel, and the Charterer's agents were satisfied with their cribbing. See McAulay's testimony (R. 31). The loss occurred before any question of the *Ship's safety* arose. The Charterer's witness, Bennett, admitted that it never would have arisen (R. 114). But the Charterer's cribbing broke before it had been subjected to half the strain to which it might normally have been subjected during the voyage had the Ship carried no list at all.

Can it be doubted, in view of these facts, that the inherent weakness of the cribbing was the proximate cause of its breaking, and of the resulting loss? This was the view of the Circuit Court of Appeals (R. 207, 208).

The precautions which were taken to guard against another such loss when the cargo was loaded for the third trip under the charter-party are significant. It would naturally be expected that the Charterer would seek to remedy the condition which caused the loss on the previous trip. But the Charterer paid no particular attention to the amount of cargo that was loaded on this third trip, and the

ship actually began the voyage with about the same list that she had on the second trip (R. 145). However, on the third trip (the one following the loss of deck cargo) the new uprights, produced by the Charterer for the erection of a new cribbing, were doubled in strength (R. 176, 51), and, furthermore, the Charterer used heavy chain lashings to secure them (R. 176, 51, 52).

This shows what the Charterer, at that time, thought was the best way to make sure that there would be no repetition of the loss, and it fits in precisely with all the other evidence in the case as to the cause of the loss.

III.

The Charterer, having Erected This Cribbing for Its Own Benefit and having Loaded and Stowed the Cargo under a Charter-Party which made This Its Duty, must Bear the Loss Caused by the Weakness of the Cribbing and the Improper Loading and Stowing.

The respective obligations of the parties in this case are entirely governed by the terms of a written charter-party (R. 179-185). It is a time charter in the usual "government form." By its terms the "whole reach of the vessel's holds, decks and usual places of loading and accommodations of the ship (*not more than she can reasonably stow and carry*)" was at the Charterer's disposal (clause 7, R. 181). Although there was no demise of the Ship, there was an "estate carved out of the ship and handed over for a specified term to the charterer."

> *The Santona*, 152 Fed. 516, 518 (1907) (D.C. S.D. N.Y.).

The Charterer had the right to carry such cargoes as it saw fit, and the charter money to be paid for the use of the Ship had no relation to the amount or character of the cargo

carried, since the hiring was on a time basis, viz., three months (R. 179).

So far as all matters pertaining to cargo are concerned, the Charterer was given full control of the situation, even to the extent of making the master of the Ship the agent of the Charterer "*as regards employment or agency*" (Charter-party, R. 181), and the charter-party further provides that the—

> "Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

The Shipowner contends that under such a charter the owner has no control over or responsibility with respect to matters of loading and stowage, *except as to such matters as might affect the navigability or safety of the Ship itself.*

Both the English and American cases bear out this contention:

Blaikie v. *Stembridge*, 6 C.B. N.S. 894 (1859):

In this case a shipowner chartered his vessel under a charter-party which contained the following provision:

> "Stevedore . . . to be appointed by charterer, but to be paid by and to act under captain's orders."

The charterer set the vessel up as a general cargo carrier, and plaintiff's goods were damaged by charterer's stevedore in the loading operation. Plaintiff sued the master of the vessel. Judgment for the defendant. The Court (p. 908) says:

> "It appears, therefore, that a stevedore has from early times been known as an agent distinct from the crew, and that for his conduct when appointed by the shipper, the master is not responsible."

In commenting on the phrase "act under the captain's orders" the Court says, at page 908:

> "The stevedore was to be appointed by the charterer, and therefore to act for him and represent his interests. For this purpose, he had the charge and custody of the goods until they were laden and stowed on board. The master, on the part of the owners, *with a view to the trim and safety of the ship*, had control over the stevedores; but there was no stipulation that he should in any other way assist the latter." (Italics ours.)

It is important to note that in the case cited above the cargo was owned by a third party, whereas in the case at bar the cargo was owned by the Charterer itself, who did the loading and stowing.

The Catherine Chalmers, 2 Asp. M.C. N.S. 598 (1874):

In this case the charter-party provided:

> "Vessel not to be ballasted with anything prejudicial to the cargo, and to be stowed by charterer's stevedore at risk and expense of vessel."

Charterer's stevedore stored wine so that the casks strained in heavy weather and leaked on the rest of the cargo, damaging it. The owner of the damaged cargo sued the ship. Judgment was for the ship, the Court holding that, so far as the damage was due to bad stowage, it rested upon the Charterer. The Court said:

> "The stevedore, who is the agent of the charterer by the terms of the charter party, had an empty ship and might have stowed the cargo as he saw fit, *subject only to the master's control in matters affecting the safety of the ship;* yet with all his knowledge of the subject

the stevedore deliberately places the wine and nuts in the way that has been proved." (Italics ours.)

See also—

Swainston v. *Garrick*, 2 L.J. N.S. Ex. 255 (1833).
The Centurion, 57 Fed. 412 (1893) (D.C. N.Y.).
Corsar v. *Spreckles*, 141 Fed. 260 (1905) (C.C.A. 9).
British Maritime Trust v. *Munson Line*, 149 Fed. 533 (1906) (D.C. N.Y.).
The Oakley C. Curtis, 4 Fed. (2d) 979 (1924) (C.C.A. 2).

See also—

The Elizabeth Edwards, 27 Fed. (2d) 747 (1928) (C.C.A. 2):

In this case a vessel was overloaded with a deck cargo of nitrate of soda, causing the deck seams to open and admit water to the hold and damaging the cargo. There was no written charter-party. The Court found that the shipper agreed to assume the risk of injury to his cargo by reason of such overloading. The ship was a private and not a common carrier, and the Court held the agreement legal and binding upon the shipper, but added the following significant words:

"Even in the absence of such a specific agreement it may perhaps be doubted whether the ship would be responsible for damage caused solely by bad stowage by the shipper's stevedores. See The Thomas P. Beal, 11 F. (2d) 49, 52 (C.C.A. 3); The Oakley C. Curtis, 4 F. (2d) 979, 981 (C.C.A. 2). But we prefer to rest our decision upon the court's finding, for which there is warrant in the evidence, that the shipper agreed to take the risk."

The suggestion may be ventured that the reason the Court preferred to rest its opinion on the special agree-

ment was that the improper stowage affected the structure of the ship itself, and thus presented a very close question as to whether the type of unseaworthiness involved the vessel herself, or only the cargo. Yet a reading of the decision leads to the conclusion that, even had there been no such special agreement, the Court would nevertheless have exonerated the ship; and it is submitted that this result could have been reached in conformity with the precedents if, as a practical matter, the unseaworthiness jeopardized only the cargo, and not the vessel herself.

The Thomas P. Beal, 11 Fed. (2d) 49 (C.C.A. 3, 1926):

In this case the Court of Appeals for the Third Circuit had before it the question of the responsibility for bad stowage as between the owner of a ship and a time charterer, for damage done to a third party's cargo. The charter in question was apparently in the usual "government form," and contained provisions like those in question in the case at bar. The Court found that the charterer did the stowing by its own stevedores, just as in the case at bar. The Court held the charterer liable and exonerated the ship, and in so doing used the following language, at page 52:

> "On the issue of liability for bad stowage, as between the time charterer and the shipowner, the time charterer relies mainly on cases which hold generally, and very properly, that responsibility for the seaworthiness of a chartered ship is on the shipowner. [Citing cases.] But that, generally, means responsibility for seaworthiness of the ship as against perils of the sea; it does not, in every instance, mean responsibility for her seaworthiness in respect to stowing cargo."

See also—

The Santona, 152 Fed. 516, 518 (1907) (D.C. S.D. N.Y.).

The Santa Clara, 281 Fed. 725 (1922) (C.C.A. 2).
Manchisa v. *Card*, 39 Fed. 492 (1899) (D.C. S.C.).
Munson Steamship Line v. *Glasgow Co.*, 235 Fed. 64 (1916) (C.C.A. 2).
The Kaupanger, 241 Fed. 702 (1917) (D.C. S.D. N.Y.).

Both the Charterer and the learned District Judge appear to rely principally upon the case of—

Olsen v. *United States Shipping Co.*, 213 Fed. 18 (1914) (C.C.A. 2):

This was a suit by a shipowner against a charterer to recover the amount which the shipowner had been obliged to pay to a third party who held bills of lading issued by the master, for the loss of deck cargo *which the master had jettisoned* to save the ship from capsizing. The charter was in "government form," which, as in the case at bar, required the charterer to load and stow the cargo. There was a dispute as to whether too much deck cargo was being put on, but, after a survey which decided against the contentions of the master, more deck cargo was loaded, and the ship left port with a list of 11 degrees. The cargo consisted of heavy logs loaded both under and on deck. Although there was no stress of weather the list increased to 24 degrees, and the master, believing that his ship was in danger of foundering, jettisoned a part of the deck cargo to save the ship from disaster. The value of the jettisoned cargo was the subject of the litigation. The District Court found in favor of the ship, but this decree was reversed by the Circuit Court of Appeals, which held the ship responsible on the ground that the ship herself was in an unseaworthy condition at the time of the loss, and that this unseaworthiness caused the loss of the cargo. But in reaching this conclusion the Court recognized the distinction between a con-

dition of unseaworthiness which affects the safety of the ship itself and a condition of unseaworthiness which pertains only to the safety of the cargo. The Court said:

> "It is true that when charterers load cargo against the protest of the master in such a way that it is itself damaged and or damages other cargo, the charterer will be liable. The Centurion (D.C.) 57 F. 412. Likewise when cargo loaded on deck by agreement is lost because of a peril of the sea the ship will be excused. Lawrence v. Minturn, 17 How. 100; 15 L. Ed. 58. We are not willing to extend this to such a loading *as makes the ship herself unseaworthy* when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the *ship herself*." (Italics ours.)

In the Olsen case, therefore, the Court was dealing with a case where the master himself thought that his ship was unseaworthy when she left port, using the term "unseaworthy" in the sense that her own safety was endangered. And events proved this to be the case. It was not a case where the overloading or bad stowage affected only the safety of the cargo. On the contrary the master allowed himself to be overriden by the charterer with respect to a matter that was peculiarly within the master's own province, viz., the safety and navigability of his ship, and this point is stressed by the Court in deciding the Olsen case.

This distinction between the rights and obligations of the master of a chartered vessel, with respect to the safety and navigability of the ship on the one hand and matters involving only cargo on the other, runs through all the cases above cited. It is based not only upon practical considerations involved in the shipping business, but also upon the express provisions of charter-parties similar to the one in the case at bar, which imposed upon the Charterer the duty

of loading and stowing, and which turned over to the Charterer the entire cargo-carrying capacity of the Ship.

In the case at bar, regardless of the precise provisions of the charter-party, there can be no doubt but that the Charterer took active charge of building the cribbing and stowing the cargo in it. The Circuit Court of Appeals says (R. 207):

> "The work was planned and done by the Charterer's men under the supervision of its Superintendent. The master of the Nidarholm said that he was unfamiliar with such structures and left it to them. The steamer supplied ex gratia at the Charterer's request some of the lashings and her men made them fast. The master does not appear to have been consulted at all about the dimensions or material of the stanchions and stringers or the way in which the crib was put together. He was consulted about the lashings and expressed the opinion that one reaching from side to side at the foremast was unnecessary."

The character of these stanchions, the way they were placed and secured, were all matters of no interest to the master or the Shipowner. The master had never seen them placed and secured as the Charterer proceeded to place and secure them in this case (R. 158). On the other hand, the Charterer's engineer had prepared at least ten other ships in the same way (R. 33), and the Charterer's stevedore had loaded over a hundred ships in the same manner (R. 13, 33).

Wholly apart from precedent and the precise terms of the charter-party, it would be inequitable and unjust to place upon the Ship the responsibility for the negligent way in which this work was carried out, particularly as it was undertaken solely for the financial interest of the Charterer, viz., in order to transport as much cargo as possible during the period of the charter. In whatever light the

obligations of the parties in this case are considered, the fact remains that the Charterer undertook to build the cribbing, and to load and stow the cargo therein, and that its performance was negligent and insufficient. For this negligence the Charterer stands charged with fault, and no technical argument can relieve it of this burden.

IV.

So Far as the Master had Any Connection with the Loading and Stowing of the Cargo, it was as Agent of the Charterer.

Clause 8 of the charter-party (R. 181) provides:

> "The Captain, (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency and charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign bills of lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

This is a common clause in time charters, obviously designed to meet the practical needs of a situation where the master of a vessel acts in a dual capacity—as agent of the shipowner for certain purposes, and as agent for the charterer for other purposes. So far as the actual navigation of the ship is concerned, the master remains the agent of the shipowner, who becomes responsible for the master's errors in seamanship.

The Volund, 181 Fed. 643 (1910) (C.C.A. 2).

But this rule is limited to matters involving the management of the ship itself, as contrasted to matters where the master acts solely with reference to cargo.

See *The Beaver*, 219 Fed. 134 (1915) (C.C.A. 9)—

where the Court said:

> "Where the officers of the vessel are agents of the owners as to certain matters and of the charterers as to others, they will be regarded as agents of one party or the other according to the work on which they are engaged."

See also *The Santona* (*supra*).

In *The Thomas P. Beal* (*supra*), the Court, in speaking of a charter-party like the one in the instant case, said:

> "The terms of the charter party made it certain there was a letting of the ship as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee whereas, in the latter, the relation is that of carrier and shipper. (Citing cases.) According as it is one or the other the question arises whose agents wrought the injury, and there is suggested the inquiry put by Lord Esher in 1 Q.B. 258: 'When is a captain the owner's captain?' Transposing the question, we ask: 'When is the captain the charterer's servant?' Directing these inquiries to the case in hand, it is clear that, within the law of The Santona (C.C.) 152 F. 516, 518, opinion by Judge Hough, while the owner did not surrender possession or control or command or navigation of the ship, 'he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship (was) the owner's ship, and the master and crew his servants for all details of navigation and care of the vessels; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew (were) the servants of the charterers.' And so the parties in this case construed the charter

> party, for it is perfectly clear that the charterer, first at one port and then at another and finally at San Francisco, booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility therefor. On the issue between the charterer and the ship we find the charterer liable."

The relation of the master to the charterer in such a case is well expressed in the case of—

Pacific Imp. Co. v. *Schubach-Hamilton S.S. Co.*,
214 Fed. 854 (1914) (D.C. Wash.)—

where the Court, in discussing an agency clause similar to the one in the case at bar, said (p. 860):

> "These provisions, so far as orders, directions, instructions and control upon the part of the charterer are concerned, contemplate such orders as the charterer sees fit to give in the matter of cargo, fuel, loading, unloading, the time of departure from ports, the ports to be made, the order in which made, the wharves, or means to be used in loading or unloading, and similar directions concerning the voyage, and were, evidently, the only ones in contemplation."

This being the state of the law, it is immaterial that the learned District Judge found as a fact that the master of the Ship personally supervised and bossed the loading, trimming, and securing of the cargo (R. 199), although the evidence does not warrant such a finding. The only thing the master had to do with the loading and stowing of the deck cargo was the placing of 15 additional cords of wood on the vessel, only five of which were put forward where the first loss occurred (R. 17). Such a small addition to the Ship's deck load could not have had any appreciable effect upon her stability.

There was no evidence whatever that the master had anything at all to do with the stanchions, or the manner in which they were placed against the Ship's bulwarks. As already noted, the Circuit Court of Appeals finds plainly that this work was planned and done by the Charterer's men under the supervision of its superintendent (R. 207).

V.

The Authorities Cited in the Charterer's Brief.

The only case decided by this Court referred to in the Charterer's brief is—

Lawrence v. *Minturn*, 17 How. 100; 15 L. Ed. 58.

This case arose under circumstances entirely different from those in the case at bar. There was no charter-party at all in *Lawrence* v. *Minturn*. The duty of loading and stowing was carried out by the shipowner. And this Court actually exonerated the ship of any responsibility for loss caused by the jettison of a deck cargo, it being shown that the ship herself was in peril.

The case of *Hamilton* v. *United States*, 268 Fed. 15, involved the refusal of seamen to serve on a ship incapacitated by the loss of her propeller. The ship was held to be seaworthy, and consequently the seamen were not excused from liability for conspiracy to revolt. The case has no bearing on the responsibility of a ship for loss of cargo.

The reasoning and holding of Judge Learned Hand in the case of *The Kaupanger*, 241 Fed. 702, supports the contentions of the Ship rather than those of the Charterer in the case at bar. The case is cited by us on page 27, above. The opinion recognizes the liability for proper stowage on the part of a charterer who assumes the duty of loading and stowing, and it cites with approval the same English cases which we cite above (pages 23, 24, 25).

Harloff v. *Barber*, 150 Fed. 185, is a typical example of the general rule that, in the absence of an agreement to the contrary, the duty of loading and stowing rests upon the owner of a chartered vessel, and upon the master as his representative. There is, however, an express "agreement to the contrary" in the charter-party in the present case, by the terms of which the Charterer undertakes to do the loading and stowing, and by which the master is made the agent of the Charterer.

In *The Seguranca*, 250 Fed. 19, the master required part of the cargo to be unloaded in order that his vessel might sail in a seaworthy condition. The Court held the shipowner liable for the cost of this work and the resulting loss of cargo space. But there the only duty upon the charterer was to furnish a stevedore.

It appears from the opinion that the Court found as a fact that the master permitted or even approved the stevedore's method of stowage, but later required the partial discharge of cargo. Presumably the master did this to ensure the safety of the ship herself. It is submitted that the case does not support the Charterer's contentions.

In *The Dana*, 190 Fed. 650, it appeared that, due to a bad leak and the shifting of water in her tanks, the vessel developed such a list that her deck cargo was lost. The owner was held liable on the grounds that the sole cause of the loss was the negligence of the crew in respect to matters directly involving the safety of the ship. No question of bad stowage was involved in the case.

The case of *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, has already been commented on *supra* (pp. 27, 28).

Conclusion.

From the above consideration it is submitted that the Charterer should be held solely at fault for the loss in question. If, however, this Court should be of the opinion that there was some fault on the part of the Shipowner which contributed to the loss, then the rule of divided damages should be applied, as was done in the Circuit Court of Appeals.

Respectfully submitted,

ROBERT E. GOODWIN,

Proctor for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 58.—October Term, 1930.

Oxford Paper Company, Petitioner, *vs.* Steamship "Nidarholm". } On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 24, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, charterer of the Steamship "Nidarholm", brought this admiralty suit *in rem* in the District Court for Southern Maine, to recover damages for the loss of part of a cargo of pulpwood from the deck of the vessel, where it had been stowed by the charterer. The time charter party, which was in the usual "government form", see *Golcar S. S. Co.* v. *Tweedie Trading Co.*, 146 Fed. 563, placed at the charterer's disposal "the whole reach of the vessel's holds, decks and usual places of loading", and provided that "charterers . . load, stow, and trim the cargo at their expense under the supervision of the captain". The question was whether, under these clauses of the charter party, the ship was liable for the loss, although one of its causes was the failure of the charterer to make the deck load secure. Judgment for the libellant, petitioner here, in the District Court, 26 F. (2d) 92, was reversed by the Court of Appeals for the First Circuit, which divided the loss. 34 F. (2d) 442; rehearing denied, 36 F. (2d) 227. This Court granted certiorari, 281 U. S. 712, on a petition which relied in part on an alleged conflict of the decision below with that of the Court of Appeals for the Second Circuit, in *Olsen* v. *United States Shipping Co.*, 213 Fed. 18.

The District Court found the facts as follows. The Nidarholm was chartered by petitioner for the purpose of carrying pulpwood from its plant at Murray, Nova Scotia, to Portland, Maine. In loading for the voyage in question, petitioner, after the hold was filled, piled the logs of pulpwood, cut in two-foot lengths, on the deck to a height of 17 feet. The deck load was secured by a crib, which petitioner constructed by erecting, at intervals along the rail,

stanchions about 20 feet long and from 8 to 10 inches in diameter at the butt. The stanchions were held in position by wire rope lashings. When the ship backed from the dock, she had a list to starboard of about 5 degrees; but as she proceeded on her voyage, the list shifted to the port side, and increased to between 10 and 14 degrees. Within a half hour of her departure, and while she was still in smooth water, the stanchions broke, first on the port side, then on the starboard; and the deck load above the rails spilled into the sea. The court concluded that faulty stowage of the deck load had rendered the ship topheavy and unseaworthy, and held that, since this was a breach of the duty to supervise loading which the charter party had placed on the captain, the ship was responsible for the loss.

The Court of Appeals accepted the District Court's finding that the ship was topheavy and unseaworthy because of improper loading, and its conclusion that this was a fault for which the master was responsible, but stated that the question was whether the charterer was also at fault. It pointed out that the cribbing was no part of the equipment which the vessel was under an obligation to furnish; that the charterer had erected it and chosen the material of which it was constructed; and that all the stanchions gave way at a time when the stress caused by the list of the ship was less than that which would be occasioned by the normal roll of the vessel at sea. These findings are supported by evidence.

Whether the court considered the topheaviness of the ship, caused by the faulty stowage, and the defective cribbing to be joint contributing causes of the loss, or thought the latter the proximate cause, is not clear. But it reached the conclusion, without referring to any supporting facts, that the construction of the cribbing was a joint undertaking carried out by the charterer and the vessel, for the failure of which both were at fault, and decreed that the loss be divided.

As respondent did not ask certiorari, the only question we shall consider is whether the court below was wrong in denying the asserted liability of the ship for the entire loss. *Warner Co.* v. *Pier Co.*, 278 U. S. 85, 91.

By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia*, 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty

stowage of cargo, *Corsar* v. *Spreckels*, 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca*, 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers to it from any consequent unseaworthiness of the vessel. *Olsen* v. *United States Shipping Co., supra; The Oakley C. Curtis*, 4 F. (2d) 979; certiorari denied, 267 U. S. 599; *The Dana*, 190 Fed. 650; cf. *Corsar* v. *Spreckels, supra; The Thames*, 61 Fed. 1014.

Respondent argues that the responsibility of the ship, when loaded by the charterer, is limited to faulty stowage of cargo which endangers the ship, and that when the cargo alone is imperilled, as is contended was the case here, ensuing loss must be borne by the charterer. See *Elder & Dempster Co.* v. *Paterson, Zochonis & Co.*, (1924) A. C. 522, 560-562; *Reed & Co.* v. *Page, Son & East*, (1927) 1 K. B. 743, 754-756; cf. *The Oakley C. Curtis, supra*, p. 981.

We are not aware of any case in which the rule thus broadly stated has been applied so as to relieve the ship from liability for damage to cargo exposed, by bad stowage, to sea perils peculiarly within the specialized knowledge and experience of the master. But it is unnecessary to pass on the question here for, independently of it, we think the ship cannot be held responsible for the loss imposed on petitioner by the decree below.

Whether or not the topheaviness of the Nidarholm be taken to have contributed to the loss, the collapse of the stanchions was also a contributing cause; and for the latter petitioner is responsible, at least to the extent of the one-half of the damage imposed on it below, unless there was a duty on the ship to guard against the defective construction of the cribbing.

The owner's duty to provide a seaworthy and cargo-worthy ship at the beginning of the voyage did not extend to the defective cribbing. That warranty applies only to the ship and such equipment as is called for by the charter party. Cf. *The Santona*, 152 Fed. 516, 518. The cribbing was an enlargement of the ship's structural capacity for cargo beyond what she would otherwise naturally and reasonably take, which the vessel was not required to provide, and which was constructed by the charterer for its own convenience, to facilitate its stowage of cargo. The ship owed no duty to furnish the cribbing such as would relieve the charterer from the consequences of the failure to make it safe.

Even though the master's duty of supervision of cargo stowage might, for some purposes and under other circumstances, be deemed to extend to the erection of this structure as a means of stowing the deck load, still we think there was no duty of ship or master to prevent the charterer from loading the pulpwood in such manner as to expose it to dangers ordinarily incident to the transportation of a cargo on deck, and not peculiarly within the prevision of the master. See *Lawrence* v. *Minturn*, 17 How. 100, 115. The charterer knew, as well as the master, that the ship would heel or roll at sea, and that the cribbing must be made sufficiently strong to hold the cargo on deck. We see no more reason for imposing responsibility on the ship for such an omission by the charterer than for the master's failure to prevent the charterer from stowing cargo in such manner that it is damaged by heat, *The Thomas P. Beal*, 11 F. (2d) 49; or in defective containers, *The Oakley C. Curtis, supra*, p. 982; or in such contact with other cargo that it suffers injury, cf. *Elder & Dempster Co.* v. *Paterson, Zochonis & Co., supra*. See also *Lawrence* v. *Minturn, supra*.

In the cases particularly relied upon by petitioner, the sole cause of the loss appears to have been the unseaworthiness of the ship. See *The Seguranca*, and *The Dana*, both *supra*. This was also the case with the part of the deck load of logs in *Olsen* v. *United States Shipping Co., supra*, jettisoned by the master to avoid danger to the ship, which, due to the excessive deck load, had listed 24 degrees, although no heavy weather had been encountered. Another part of the cargo of logs had been loaded by the charterer on the forward deck. As the loading was not completed until dark, the crew did not lash these logs, as they had those on the after deck. This part of the cargo spilled overboard when the master moved the ship without lashing the deck load. The court held the vessel liable, saying that she " . . . was unseaworthy as to her forward deck load, a thing which it was the duty of the master to prevent." But it did not appear that the charterer had assumed any duty of lashing the deck loads; and it is evident that the moving of the vessel before the logs were lashed, ready for the voyage, exposed them, by act of the master, to a peril within his knowledge and control. The case is thus distinguishable from the present, where the erection of the defective stanchions was the charterer's act, and where it does not appear that the defect was known to the master.

Affirmed.